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The Supreme Court and the Duty of Fair Representation

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American labor laws provide for the collective empowerment of American workers. The National Labor Relations Act (NLRA)[1] and the Railway Labor Act (RLA)[2] codify the collective bargaining process by making a labor organization, selected by a majority of the employees in an appropriate bargaining unit, the exclusive representative of all employees in that unit for purposes of negotiating wages, hours and other terms and conditions of employment. Employers and individual employees cannot bypass the exclusive representative and reach their own agreements.[3] The union's exclusive authority to represent employee interests in dealings with employers facilitates the American system of collective bargaining by eliminating competition among individual employees, which otherwise would depress wages and working conditions.

The grant of exclusive authority to represent employees contains the potential for abuse. When an employee's individual interests diverge from the union's collective interests, it is necessary to have a mechanism whereby the individual employees may hold the union accountable for its exercise of collective power. Almost fifty years ago, the Supreme Court created such a mechanism when it held that the grant of the power to serve as exclusive representative carries with it a duty to represent employees fairly.[4] The duty of fair representation (DFR) is the primary legal vehicle for holding unions accountable to the individual employees they rep-

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[1] 29 U.S.C. §§ 151–169 (1982).

[2] 45 U.S.C. §§ 151–188 (1982).

[3] J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944).

[4] Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

resent. Recognition of the DFR's role as a necessary check on the union's monopoly power defines the scope of the duty and the standard of care it embodies. The duty applies only when the union acts in its capacity as exclusive bargaining representative. The standard of care must be a function of the strength of the individual employee's interests, discounted by the union's need to be free of external legal constraints in its pursuit of collective goals.

The most common DFR claim attacks the union's representation of individual employees in grievances alleging breaches of the collective bargaining agreement by the employer.[5] This is not surprising because it is in grievance handling that the individual employee's interests are strongest. Despite the strength of these interests, the Supreme Court has neglected the issue of what standard of care a union owes employees in grievance handling.

In this Article, I analyze the Supreme Court's DFR jurisprudence. I find that the Court has not regarded the DFR as a vehicle for holding unions accountable to the employees they represent. Instead, the Court has manipulated the DFR to reach the results it desired in particular cases. Initially, the Court developed the DFR to provide a politically acceptable civil rights remedy for union-management racial discrimination. Title VII of the 1964 Civil Rights Act[6] eliminated the need for using the DFR in that way, but the Court still failed to develop the DFR systematically as a vehicle for protecting individual interests in a system based on collective power.

It was not until its 1988 decision in *Communication Workers of America v. Beck*[7] that the Court found a DFR breach that did not involve racial discrimination. In *Beck* the Court held that a union breached its DFR by negotiating and enforcing a contract requiring bargaining unit, nonmember employees to pay the union a fee that included expenditures on political and ideological activities unrelated to collective bargaining.[8] In this Article, I show that

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[5] One commentary found that approximately 80% of the DFR cases that produced published opinions between 1977 and 1983, and 90% of the cases examined from the files of three federal district courts between 1977 and 1982, involved claims arising out of grievance handling. Michael Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 128, 128–29 (1985); *see also* Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 463 n.2 (1983).

[6] 42 U.S.C. § 2000e (1988).

[7] 487 U.S. 735 (1988).

[8] Much of the reaction to *Beck* has focused on the Court's five to three holding that

the *Beck* Court did not regard the DFR as a vehicle of union accountability, but instead continued the result-oriented manipulation of the DFR. Rather than using the DFR as a civil rights doctrine to police racial discrimination, the Court now uses the DFR to enable individual employees to bypass the exclusive jurisdiction of the National Labor Relations Board (NLRB) over union unfair labor practices.

I also demonstrate that the Court's result-oriented DFR jurisprudence has distorted the scope of the duty by applying it to activities that the union has not undertaken as exclusive representative. The Court's result-orientation has also led to doctrinal confusion in the lower courts, particularly in the handling of routine DFR claims arising out of grievance processing.

In Part I, I analyze the state of the law of fair representation prior to *Beck*. I find that the Supreme Court gave the lower courts very little guidance regarding the DFR standard of care and that, predictably, the lower courts are deeply divided over the issue. In Part II, I analyze *Beck* as a fair representation case. I show that *Beck* is likely to exacerbate the lower courts' confusion over the state of the law because the decision is totally inconsistent with prior and subsequent Supreme Court and lower court approaches to the DFR. I then demonstrate that *Beck* is fundamentally flawed because it applied the DFR to how a union spends its revenue, a matter in which the DFR has no application.

In Part III, I return to the Supreme Court's overall treatment of the DFR to explain the result in *Beck*. Although I find *Beck* inconsistent with the Court's overall fair representation doctrine, I find it consistent with the Court's result-oriented approach to

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NLRA § 8(a)(3)'s authorization of union security provisions in collective bargaining agreements prohibits unions from charging objecting employees for expenditures that are not reasonably or necessarily incurred in the union's role as exclusive bargaining representative. *See, e.g.*, Roger C. Hartley, *Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases*, 41 HASTINGS L.J. 1 (1989); Lisa Rhode, Note, *Section 8(a)(3) Limitation to the Union's Use of Dues Equivalents: The Implications of Communications Workers v. Beck*, 57 U. CIN. L. REV. 1567 (1989); Charles R. Virginia, Comment, *Communications Workers v. Beck: Supreme Court Throws Unions Out on Street*, 57 FORDHAM L. REV. 665 (1989); *ABA Participants Discuss Labor Law Developments*, 133 Lab. Rel. Rep. (BNA) 303, 304 (1990). This concentration on *Beck*'s controversial substantive interpretation of § 8(a)(3) overlooks the Court's unanimous holding that the plaintiffs' complaint did not fall within the primary jurisdiction of the National Labor Relations Board because the plaintiffs stated a claim that their union breached its DFR. 487 U.S. at 735–36. The Court's holding that a union security arrangement that violates § 8(a)(3) also breaches the DFR, in the long run, may be the most significant aspect of *Beck*.

fair representation cases. I critique the Court's result orientation and call for its abandonment.

In Part IV, I suggest guidelines for establishing the borders of the duty of fair representation in contract administration and derive from general labor policies a DFR standard of care in grievance handling.

I. The State of DFR Law Prior to *Beck*

A. From Steele *to* Vaca

The Supreme Court first recognized a cause of action for a DFR breach in *Steele v. Louisville and Nashville Railroad.*[9] Black locomotive firemen sued the all-white union that represented their bargaining unit for negotiating a series of contract modifications intended to replace the black workers with whites. The plaintiffs attacked the constitutionality of the Railway Labor Act's requirement of exclusive representation, where the exclusive representative negotiated a racially discriminatory contract. The Court, however, avoided the constitutional issue by implying in the statutory grant of exclusive representative status a correlative duty to represent fairly all employees. It recognized that a union may agree to contracts having unfavorable effects on some of the employees it represents, but opined that in making such agreements, the union must base its decisions on relevant considerations rather than factors, such as race, which are "obviously irrelevant and invidious."[10]

During its first twenty years of DFR jurisprudence, all Supreme Court DFR cases except one involved racial discrimination.[11] In this context, the Court established broad parameters governing a union's DFR liability. Specifically, it held that the DFR applies to unions acting under the National Labor Relations Act, as well as the Railway Labor Act;[12] that the DFR applies to contract administration, as well as to contract negotiation;[13] that the claim arises under federal law and is actionable in federal

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[9] 323 U.S. 192 (1944).

[10] *Id.* at 203.

[11] The exception, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), is discussed *infra* at notes 120–128 and accompanying text.

[12] Syres v. Oil Workers, 350 U.S. 892 (1955).

[13] Conley v. Gibson, 355 U.S. 41 (1957).

court;[14] and that remedies for DFR breaches include damages and injunctions.[15]

During the 1960s, the Court provided a more detailed evaluation of union conduct in two major decisions: *Humphrey v. Moore*[16] and *Vaca v. Sipes*.[17] Both cases involved contract administration. *Humphrey* was brought to challenge the decision by a joint grievance committee to dovetail seniority lists of two employers, Dealers Transport Company and E & L Transport Company, who were part of a multi-employer and multi-local union bargaining unit.[18] Both employers transported new cars from Ford Motor Company's assembly plant in Louisville, Kentucky. The same local union represented the employees of both companies.

The controversy arose when Ford advised both companies that it would need the services of only one of them at the Louisville plant. E & L agreed to transfer its rights to do business in Louisville to Dealers. E & L employees in Louisville filed a grievance seeking to have their seniority list dovetailed with the Dealers' seniority list. Dealers took a neutral position, leaving it up to the union to decide whether to dovetail or endtail the E & L employees.[19]

In accordance with the collective bargaining agreement, the grievance came before a joint national grievance committee, composed of an equal number of employer and union representatives

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[14] Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944).

[15] Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 207 (1944); *Tunstall*, 323 U.S. at 214. One other major Supreme Court DFR decision during this period is Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952). In *Howard*, the Court held that a union that seeks to harm employees because of their race breaches its DFR even though the employees are not in the craft or class represented by the union and have their own statutory exclusive representative. The reach of *Howard* beyond racial discrimination is unclear. *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 428–33 (1988). Thus, it cannot be said that *Howard* established a general proposition of DFR jurisprudence. For further discussion of the problematic aspects of *Howard*, *see infra* notes 133–140 and accompanying text.

[16] 375 U.S. 335 (1964).

[17] 386 U.S. 171 (1967).

[18] When two seniority lists are dovetailed, they are merged together with years of seniority on either list treated equally. Alternatively, the lists may be endtailed, whereby the second list is appended to the end of the first list, thereby treating all seniority on the second list as subordinate to any seniority on the first.

[19] The collective bargaining agreement provided for terminal-based seniority. The E & L employees relied on another provision of the agreement that required adjustment of seniority lists through the grievance procedure whenever one employer absorbed another. The issues for the joint committee were whether Dealers had absorbed E & L and, if so, how to combine the seniority lists.

selected from the entire bargaining unit. The committee, following the local president's recommendation, dovetailed the seniority lists. Because E & L had been in business in Louisville far longer than Dealers, the dovetailing resulted in many Dealers' employees losing their jobs.

The Kentucky Court of Appeals enjoined implementation of the joint committee's decision.[20] The court held that irregularities in the joint committee's procedures deprived its decision of any entitlement to the deference traditionally due an arbitration award. In the court's view, because Dealers was neutral on the issue, the dispute was between the two groups of employees. When the local president sided with the E & L employees, the joint committee hearing ceased to be an adversarial proceeding. The court concluded, "[W]e have a situation in which two antagonistic interests were represented by the same advocate. This of itself is enough to destroy the traditional presumption in favor of an arbitration award."[21]

The Supreme Court reversed the lower court's holding. The Court treated the Kentucky court's concerns over alleged procedural irregularities as allegations that the union breached its duty of fair representation. The Supreme Court's primary concern was the Kentucky court's holding that the union acted improperly by simultaneously representing two groups of employees with conflicting interests. Such representation per se did not breach the duty of fair representation, the Court reasoned, because the simultaneous representation and reconciliation of groups of employees with conflicting interests comprises a major function of the union and a significant rationale behind the principle of exclusive representation.[22] In the absence of "hostility or arbitrary discrimination,"[23] a union does not breach its duty by representing employees with conflicting interests in the outcome of a grievance.

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[20] Moore v. Local 89, Int'l Bhd. of Teamsters, 356 S.W.2d 241 (Ky. 1962), *rev'd sub nom.* Humphrey v. Moore, 375 U.S. 335 (1964).

[21] *Id.* at 246.

[22] "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes." 375 U.S. 335, 349–50. *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220–21 (1977) (an advantage of exclusive representation is its handling of conflicting employee interests through a single voice); *but see* George Schatzki, *Majority Rule, Exclusive Representation and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975).

[23] 375 U.S. at 350.

Thus, *Humphrey*'s DFR holding simply rejects strict liability for a union that engages in simultaneous representation of conflicting employee interests.

In *Vaca v. Sipes*,[24] the Court addressed allegations of a DFR breach in more traditional grievance handling. The employer terminated an employee with a history of medical problems because the employer's doctor had determined that the employee was no longer physically capable of performing his job. The employee filed a grievance, supported by statements from other physicians that he was able to return to work. The union processed the grievance to the final step in the grievance procedure prior to arbitration. At that level, the union had the employee examined by another doctor of the employee's choice, at union expense. That doctor reported that the employee had kidney and heart damage and was unable to work. The union then withdrew the grievance, believing that it lacked merit.

The employee sued and a Missouri state court jury returned a verdict against the union for failing to arbitrate the employee's grievance. The Missouri Court of Appeals reversed, on the ground that the matter fell within the primary jurisdiction of the National Labor Relations Board. The Missouri Supreme Court reversed and reinstated the jury verdict.[25]

The bulk of the Missouri Supreme Court's decision concerned the NLRA preemption issue. The court held that the employee's claim against the union was not an arguable unfair labor practice under the NLRA. On the merits, the court held that there was sufficient evidence to support the jury's verdict against the union. Specifically, the court cited the employee's physicians' statements that the employee was able to work and the employee's testimony that since his discharge he had performed strenuous physical labor for other employers without incident.[26]

The U.S. Supreme Court reversed the Missouri Supreme Court. The Court assumed that a DFR breach would be an unfair labor practice subject to the NLRB's jurisdiction, but held that this did not deprive courts of jurisdiction over the claim.[27] On the merits, the Court held that a union's failure to arbitrate a grievance

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[24] 386 U.S. 171 (1967).
[25] Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965), *rev'd*, 386 U.S. 171 (1967).
[26] *Id.* at 660.
[27] Vaca v. Sipes, 386 U.S. 171, 176–83 (1967).

would not breach its DFR unless the decision was arbitrary, discriminatory or in bad faith,[28] and concluded on the record before it that, as a matter of federal law, the union did not breach its duty.

The Supreme Court rejected the lower court's holding that a union is liable for withdrawing a grievance that a court later determines to have merit. The Supreme Court first considered the views of commentators and some courts that employees should have the right to have any grievance arbitrated; the majority decided this position was inconsistent with the national labor policy favoring private grievance and arbitration procedures. The Court observed that when a union and an employer establish a grievance procedure, they expect to resolve most grievances prior to arbitration. Through negotiation, in the earlier steps of the grievance procedure, the parties hope to weed out frivolous claims, treat similar complaints consistently and isolate and try to resolve major problems of contract interpretation. The Court reasoned that requiring a union to arbitrate all grievances would undermine the grievance procedure by injecting individual employee negotiation, thereby destroying the employer's confidence in the union's authority as exclusive bargaining representative. The resulting increase in the number of grievances going to arbitration would overburden the arbitration process and impede it from working effectively, ultimately providing a major disincentive for the parties to continue to adhere to a grievance and arbitration system for resolving disputes.[29] The Supreme Court viewed the Missouri court's approach as suffering from the same flaw that a requirement that unions arbitrate every grievance would, because it seriously reduced the union's incentive to settle grievances short of arbitration.[30]

Turning next to the case before it, the Court held that as a matter of law the union did not breach its DFR. The Court observed that there was no evidence of bad faith in the union's decision to withdraw the grievance. It catalogued the union's efforts on behalf of the employee and concluded that the union did not act arbitrarily in finding that the employee's grievance did not merit arbitration.[31]

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[28] *Id.* at 190.
[29] *Id.* at 191–92.
[30] *Id.* at 192–93.
[31] *Id.* at 193–94.

The *Vaca* Court record established that the union engaged in no acts of malfeasance or misfeasance in its handling of the grievance. The most negative statement that could be made about the union's conduct was that its conclusion regarding the merits of the grievance was one on which reasonable minds could differ.[32] Indeed, this was the basis of the Missouri Supreme Court's affirmance of the jury verdict. Thus, the Supreme Court's holding that, as a matter of law, the union did not breach its DFR is not at all remarkable. It merely restates the Court's earlier conclusion that a union is not liable for a DFR breach merely because a court later determines that the grievance the union decided not to arbitrate had merit.

Together *Vaca* and *Humphrey* reject state court attempts to use the duty of fair representation as a means of imposing strict liability on unions. Just as *Humphrey* refuses to hold a union strictly liable for simultaneously representing conflicting interests, *Vaca* refuses to hold a union strictly liable for declining to arbitrate a grievance that a court later concludes was meritorious. *Vaca* says nothing about what level, if any, of union misfeasance, *i.e.*, unintentional misconduct, amounts to unfair representation.[33] *Vaca* also says nothing about whether union policies toward contract administration may be reviewed by a court and found to be arbitrary, and thus breaches of duty.[34]

Dissenting in *Vaca*, Justice Black characterized the equation of unfair representation with arbitrary conduct as "a standard which no one can define."[35] He chastised the Court for failing to explain what it meant by arbitrariness or bad faith and for giving lower courts no guidance in applying the standard.[36] Justice Black's observations accurately indicated the limited value of the

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[32] Even in this regard, hindsight suggests that the union's view of the merits of the employee's grievance was correct. After trial, while his appeal was pending, the employee died from a cardiovascular incident due to hypertension. Brief for Swift & Co. at 8, as amicus curiae, Vaca v. Sipes, 386 U.S. 171 (1967).

[33] Justice Black raised this issue in his *Vaca* dissent, asking, "[W]ill it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration?" 386 U.S. at 210 (Black, J., dissenting).

[34] Justice Black also raised this issue in his dissent, asking whether a union would act arbitrarily if it refused to process any grievance not filed within 24 hours after its occurrence. *Id.* at 208 (Black, J., dissenting).

[35] *Id.* at 209 (Black, J., dissenting).

[36] *Id.* at 210. Justice Kennedy, while a judge on the Ninth Circuit, similarly criticized *Vaca*. Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1091–92 (9th Cir. 1978) (Kennedy, J., concurring).

Court's decision for resolving future disputes and proved to be an accurate prediction of the confusion that would follow as lower courts subsequently struggled to apply *Vaca*.

B. Lower Court Applications of Vaca

Considering the imprecision of *Vaca*'s standard and the case's very limited holding, it is not surprising that the lower courts divided over how to apply *Vaca*. The lower courts expressly divided over whether intentional union misconduct is an essential element of a DFR breach.[37] Although the courts have not explicitly classified their positions concerning the standard governing the DFR,[38] the lower courts' DFR opinions can be grouped into four basic approaches: intentional misconduct, rational explanation, gross negligence and a functional approach used by the Ninth Circuit.[39] None of these approaches provide a workable general DFR standard in grievance handling.

1. Intentional Misconduct

Prior to the Supreme Court's decision in *Air Line Pilots Ass'n v. O'Neill*, a few courts equated the duty of fair representation with a prohibition against intentional union misconduct.[40] These courts offered several reasons for this approach. First, they observed that under *Vaca* and *Hines v. Anchor Motor Freight, Inc.*,[41]

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[37] The Supreme Court appears to have settled this issue in its recent decision in Air Line Pilots Ass'n v. O'Neill, 111 S. Ct. 1127 (1991).

[38] *See, e.g.*, Griffin v. United Auto Workers, 469 F.2d 274, 301 (4th Cir. 1972) ("duty of fair representation is a legal term of art, incapable of precise definition").

[39] The ensuing discussion of these four approaches updates and amplifies the analysis previously developed by Professor Lorraine Schmall and myself. *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 357–71 (1988). Ours is not the only possible classification. For example, Professor Julius Getman and attorney Bertrand Pogrebin have discerned two basic approaches: a process model and an individual rights model. JULIUS GETMAN & BERTRAND POGREBIN, LABOR RELATIONS[:] THE BASIC PROCESSES, LAW AND PRACTICE 186 (1988).

[40] The Seventh Circuit was the strongest adherent to this position. Grant v. Teamsters Local 710, 832 F.2d 76 (7th Cir. 1987); Camacho v. Ritz-Carlton Water Tower Place, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986); Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983); Supercunski v. P.T.O. Services, Inc., 706 F.2d 200 (7th Cir. 1983); Graff v. Elgin, Joliet & E. Ry., 697 F.2d 721 (7th Cir. 1983); Hoffman v. Lonza, 658 F.2d 519 (7th Cir. 1981). The Seventh Circuit, however, was not alone in adopting this approach. *See, e.g.*, Medlin v. Boeing Vertol Co., 620 F.2d 957 (3d Cir. 1980); Brady v. Trans World Airlines, 401 F.2d 87 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969).

[41] 424 U.S. 554 (1976).

a DFR breach permits reexamination of the merits of the grievance, despite contractual provisions declaring the grievance procedure to be final and binding. Consequently, these courts expressed concern that any DFR standard other than intentional misconduct would lead to collusion between the DFR plaintiff and the union to reactivate a grievance after it was resolved unfavorably in the grievance procedure.[42]

Second, the courts requiring intentional misconduct observed that union officials are not lawyers and should not be held to a professional malpractice standard; in addition, judges do not sufficiently understand the workplace in order to formulate a standard of care for union officials.[43] Third, they observed that unless there is hostility between the union and the employee, the union has every incentive to represent the employee as competently as possible, and that if the union acts incompetently, its members can vote for new officers or a new union.[44] Fourth, perhaps inconsistent with the third reason, these courts expressed concern that the imposition of any standard of care on unions would distort union decisions concerning allocation of union resources.[45] Finally, they concluded that imposing an objective standard of care on unions in grievance handling would undermine the finality of the grievance process and its role in workplace self-government.[46]

Recently, however, the Supreme Court rejected the contention that intentional misconduct is required for a DFR breach. In *Air Line Pilots Association v. O'Neill*,[47] a case arising out of contract negotiation, the Court interpreted its prior DFR cases to hold that a union may breach its duty with conduct that is arbitrary, although not intentionally malfeasant. In the context of contract negotiation, the Court held that a union's conduct is arbitrary only if it is "so far outside a 'wide range of reasonableness' as to be irrational."[48] The Court derived this highly deferential objective standard from the federal labor policy of avoiding interference in the substantive bargain reached by the union and the employer.

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[42] *Camacho*, 786 F.2d at 245; *Hoffman*, 658 F.2d at 522.
[43] *Graff*, 697 F.2d at 779.
[44] *Id.*; *Dober*, 707 F.2d at 295.
[45] *Camacho*, 786 F.2d at 245.
[46] *Id.* at 244.
[47] 111 S.Ct. 1127 (1991).
[48] *Id.* at 1130 (*quoting* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

One can expect that the courts that equated a DFR breach with a showing of intentional misconduct will react to *O'Neill* by equating arbitrariness with irrationality in all DFR contexts, including grievance administration. In so doing, they will move toward the "rational explanation" approach already used by other courts. As the ensuing discussion shows, however, the rational explanation approach does not provide a workable general DFR standard.

2. *The Rational Explanation Approach*

Even before *O'Neill*, a large group of courts developed a rational explanation approach toward union misfeasance. This approach requires a union to offer a rational explanation for its conduct. If the court accepts the explanation, then the plaintiff must establish intentional misconduct to sustain a DFR claim. If no evidence of intentional misconduct exists, the union's misfeasance is deemed to be "mere negligence," which cannot amount to a DFR breach. If the court rejects the explanation, then the union has acted irrationally and is liable.[49]

The rational explanation approach differs significantly from the intentional misconduct approach by placing a burden on the union to explain its conduct. Under the intentional misconduct approach, the union need not offer an explanation in the absence of evidence of union malfeasance. The rational explanation approach, however, begs the question of what standard courts should use in deciding whether to accept the union's explanation.[50]

In DFR grievance handling cases, a court's review of the union's explanation is not to determine whether the union's conduct was justified. Rather, the courts have drawn a line between arbitrary union conduct, which breaches the DFR, and merely negligent conduct, which does not. Review of the union's explanation enables the court to evaluate on which side of the line the

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[49] *See, e.g.*, Hellums v. Quaker Oats Co., 760 F.2d 202 (8th Cir. 1985); National Labor Relations Board v. Teamsters Local 282, 740 F.2d 141 (2d Cir. 1984); Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981); Foust v. International Bhd. of Elec. Workers, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[50] For example, in *O'Neill*, the Supreme Court indicated that courts should be very deferential in reviewing the rationality of union conduct in contract negotiation.

union's misfeasance belongs. The courts, however, have employed different levels of scrutiny in reviewing the unions' explanations and have reached inconsistent results.

For example, in *Foust v. International Brotherhood of Electrical Workers*,[51] the union missed the grievance filing deadline by two days, and the contractually established systems board of adjustment denied the grievance as untimely. The employee's lawyer had written to the union official responsible for filing the grievance requesting his assistance in contesting the discharge. The union official received the request eight days before the filing deadline. The union apparently followed its standard procedure for processing grievances, even though this delayed the filing beyond the deadline. The court held that there was sufficient evidence to support the jury's verdict against the union, faulting the union for not telephoning the employee and expediting the grievance's handling.

In *Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse*,[52] the court also upheld a jury verdict that a union breached its DFR. The employee plaintiffs alleged that they had been terminated in violation of the contract's seniority provisions. The union decided not to process their grievances because it was pressing unfair labor practice charges before the National Labor Relations Board. The court rejected the union's argument that proceeding through the grievance procedure was in conflict with the charges pending before the NLRB; the NLRB charges attacked layoffs caused by subcontracting, whereas the grievants' layoffs were caused by automation.

In *Ruzicka v. General Motors, Inc.*,[53] however, the court found no DFR breach, even though the union lost the grievance because it filed a contractually required position statement twenty-one days late. The evidence indicated that the union and the company had followed a practice of routinely granting extensions of time for filing grievance statements, even when requested after the filing deadline. The court accepted this explanation as rational

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[51] 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

[52] 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

[53] 86 L.R.R.M. (BNA) 2030 (E.D. Mich. 1973), *rev'd*, 523 F.2d 306 (6th Cir. 1975), *on remand*, 96 L.R.R.M. (BNA) 2822 (E.D. Mich. 1977), *rev'd*, 649 F.2d 1207 (6th Cir. 1981), *on remand*, 108 L.R.R.M. (BNA) 2319 (E.D. Mich. 1981), *aff'd*, 707 F.2d 259 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983).

and concluded that the union's misfeasance amounted to mere negligence, which could not breach the DFR.

In reality, however, the union did not rely negligently on the prior practice of granting extensions when it missed the filing deadline. The union's statement was filed, but this was done only after the union official initially responsible for filing it left office, and his replacement, in reviewing all of the active grievance files, observed that the Ruzicka position statement had never been presented to management. The successor, however, did not rely on a past practice of granting extensions when he filed the statement. Rather, he filed it as soon as he could when he discovered that it had not been filed.[54]

In reviewing the union's explanation, the *Ruzicka* court did not require specific reliance. Instead, it found a general reliance on the extension practice by observing that the union's inattention to procedural details arose from a belief shared by management that deadlines were not important.[55] The court concluded that the union's delay in filing its position statement, when viewed in light of the parties' generally lax practices regarding deadlines, was negligent rather than arbitrary.

Facially, each of these three cases appears consistent with the other two. Each court opined that negligence does not breach the DFR.[56] Each court required the union to explain its actions in a rational way and evaluated the explanation to determine whether the union acted arbitrarily. They reached inconsistent results, however, because the courts in *Foust* and *Figueroa de Arroyo* scrutinized the unions' explanations more closely than did the court in *Ruzicka*.

If the union's sloppiness in *Ruzicka* was negligent, it is inconsistent to brand the union's rigidity in *Foust* as arbitrary. The unions' deficiencies in both cases are comparable. In *Ruzicka* the union should have realized that its inattention to deadline detail was endangering the grievance, just as in *Foust* the union should have realized that its reliance on postal instead of telephonic communication with the grievant endangered the grievance. Similarly,

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[54] *Ruzicka*, 96 L.R.R.M. at 2829; 86 L.R.R.M. at 2031.

[55] *Ruzicka*, 108 L.R.R.M. at 2321.

[56] *Ruzicka*, 649 F.2d at 1212 ("[W]e cannot hold a union liable for breach of the duty of fair representation based upon simple negligence."); *Foust*, 572 F.2d at 715 ("'arbitrary' conduct calls for more than 'mere errors in judgment'"); *Figueroa de Arroyo*, 425 F.2d at 284 ("due care has not been made a part of the union's duty").

in *Figueroa de Arroyo*, the union should have understood that a proceeding attacking subcontracting would not obtain relief for employees who lost their jobs to automation. The level of scrutiny of the union's explanation indirectly determined the standard of care that each court applied. Therefore, the rational explanation approach does not provide a general standard of care for the union's DFR. It only redefines the question from, "What misfeasance is arbitrary?" to "How rational must the explanation be?"

3. Gross Negligence

Some courts have equated *Vaca*'s proscription of arbitrary union conduct with gross negligence.[57] The Seventh Circuit has expressly rejected a gross negligence standard as too vague.[58] Professor David Gregory, although acknowledging the criticisms of the gross negligence standard, has advocated it, arguing that such a standard has an established history and avoids holding unions to lawyer-like standards, while affording employees relief from reckless disregard by a union of the consequences of its actions.[59] Unfortunately, characterizing a DFR breach as equivalent to gross negligence also begs the question of how closely the courts should scrutinize union misfeasance. For example, depending on the degree of scrutiny, a court could easily characterize the union's rigidity in *Foust* as demonstrating reckless disregard for the approaching filing deadline,[60] or mere negligent conduct, blindly adhering to routine procedures.

4. The Ninth Circuit's Functional Approach

Finally, the Ninth Circuit Court of Appeals has developed a functional approach to the DFR standard of care that focuses on the merits and importance of the grievance, the type of union conduct involved and other surrounding circumstances. Unfortunately, this functional approach also fails to provide a workable

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[57] *See, e.g.*, Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982); Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980).

[58] Graff v. Elgin, Joliet & E. Ry, 697 F.2d 771, 778 (7th Cir. 1983).

[59] David L. Gregory, *A Call for Supreme Court Clarification of the Union Duty of Fair Representation*, 29 ST. LOUIS U.L.J. 45, 87–89 (1984).

[60] The trial court in *Foust* characterized the plaintiff's claim in part as alleging "gross nonfeasance." 572 F.2d 710, 714 (10th Cir. 1978).

general DFR standard and has been reformulated several times, leading to grossly inconsistent results.

The Ninth Circuit has frequently demanded a rational explanation from union defendants for their conduct and closely scrutinized that explanation. The court has indicated that the more important and meritorious a grievance, the more substantial must be the explanation of the union's conduct in abandoning it.[61] It also has imposed a duty to exercise caution where there are potential conflicting interests,[62] and to employ special care in handling discharge grievances.[63]

In *Dutrisac v. Caterpillar Tractor Co.*,[64] the court held a union liable for negligently missing a deadline for filing an arbitration demand. The court held that a union's negligence breaches its DFR when the individual's interest at stake is strong and the union has failed to perform a ministerial act, resulting in the extinction of the individual's claim.[65]

In *Eichelberger v. National Labor Relations Board*[66] the court characterized *Dutrisac* as "an abrupt divagation in the trend of authority,"[67] and expressed "discomfort" with the decision.[68] It confined application of *Dutrisac* to cases where the union's negligence was "the solitary and indivisible cause of the extinguishment of an employee's grievance rights."[69]

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[61] Gregg v. Teamsters Local 150, 699 F.2d 1015, 1016 (9th Cir. 1983).

[62] Tenorio v. National Labor Relations Board, 680 F.2d 598, 602 (9th Cir. 1982).

[63] *Id.*

[64] 749 F.2d 1270 (9th Cir. 1983).

[65] *Id.* at 1274.

[66] 765 F.2d 851 (9th Cir. 1985).

[67] *Id.* at 855.

[68] *Id.* at 855 n.6.

[69] *Id.* at 855. In *Eichelberger*, an employee who had resigned at her supervisor's request asked her union to grieve her "termination" and her wage and sexual harassment complaints. The union decided not to do so after concluding that the claims lacked merit. Had the union notified the employee of its decision, she could have filed the grievance herself. Instead, the contractual deadline passed with no grievance filed.

The court observed that the employee took no action on her own to file the grievance or to monitor the union's actions and had actually waited until a considerable portion of the 30-day filing period had elapsed before asking the union to grieve on her behalf. It concluded that the employee's conduct contributed to her loss of grievance rights. *Id.* at 857.

Although the *Eichelberger* court devoted most of its analysis to *Dutrisac*, the facts of the case more closely resembled Robesky v. Quantas Air Lines, 573 F.2d 1082 (9th Cir. 1978), a case that also involved a union's failure to notify a grievant of its negative evaluation of the grievance. In *Robesky*, the nondisclosure caused the grievant to reject a company settlement offer of conditional reinstatement without back pay. The union justified its conduct as a tactic necessary to secure the best possible settlement for the grievant, but the court rejected the explanation as insubstantial and, using a closely scrutinized rational

A year later, however, the Court revived *Dutrisac* and expanded it to negligent ministerial acts outside of grievance handling.[70] At that point, although somewhat inconsistently, the Ninth Circuit case law indicated that union DFR liability would turn on multiple factors, including: the strength of the grievance; the importance of the grievance or other individual interest at stake; the strength of the union's explanation for its conduct; whether the union's conduct was ministerial; the potential conflicts between the union's and individual's interests; and the degree to which the union's misfeasance prejudiced the employee's rights.

Soon thereafter, however, the Ninth Circuit reinterpreted its DFR case law. The court distinguished between union conduct that was ministerial or procedural and union conduct involving the exercise of judgment. If the conduct was ministerial or procedural, a DFR breach arose if the union acted arbitrarily; but if the conduct involved the exercise of judgment, a DFR breach arose only on a showing of intentional misconduct.[71] This marked a radical departure from prior cases where the court objectively reviewed and held the union liable for tactical judgments.[72]

Recently, the Ninth Circuit retreated from its ministerial act of judgment dichotomy. In *Peters v. Burlington Northern Rail-*

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explanation approach, held the union liable. In *Eichelberger*, the only explanation for the union's conduct was that the relevant union official was preoccupied with union litigation. The explanation in *Eichelberger* appears even less substantial than the explanation in *Robesky*. The *Eichelberger* court, however, did not discuss the underlying facts in *Robesky*. Instead, it characterized *Robesky* as finding "reckless disregard" for the grievant's rights and dismissed it as inapposite to the facts in *Eichelberger*. 765 F.2d at 856 n.8.

[70] Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986) (failure to advise company of union steward who qualified for superseniority).

[71] *See, e.g.*, Herring v. Delta Air Lines, Inc., 894 F.2d 1020 (9th Cir. 1990); Burkevich v. Air Line Pilots Ass'n, 894 F.2d 346 (9th Cir. 1990); Salinas v. Milne Truck Lines, Inc., 846 F.2d 568 (9th Cir. 1988); Moore v. Bechtel Power Corp., 840 F.2d 634 (9th Cir. 1988).

[72] The court did not characterize this approach as a radical departure from its prior precedents. Rather, it read *Dutrisac*, *Galindo* and Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) as establishing the dichotomy between ministerial acts and acts of judgment and requiring intentional misconduct when the act involved judgment. *See Moore*, 840 F.2d at 636. Such a reading grossly distorts the three decisions. *Dutrisac* and *Galindo* did distinguish ministerial acts from actions involving judgment but did so only to specify when simple negligence would breach the DFR. There is language in *Peterson* which, if read in isolation, might support a reading that intentional misconduct is required for a DFR breach when the union's actions involve judgment. *See Peterson*, 771 F.2d at 1254 ("[W]e have held consistently that unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances."). Read in context, however, it is clear that the analysis in *Peterson* also focused on when to hold a union liable for negligence. *See id.* at 1255 ("Freeing a union from liability for ordinary acts of negligence in the performance of its representational responsibilities requiring judgment on its part, reflects a balance of the union's organization interest against the individual interests of its members.").

road,[73] the court held that a union may breach its DFR even though it acts in good faith, if it gives an employee erroneous advice on how to act in accordance with a collective bargaining agreement and if it fails to advance meritorious arguments in processing a grievance. The court characterized ministerial acts and acts of judgment as guideposts, marking points on a continuum running from discretionary decision-making to inexplicable conduct. It opined that a union's unexplained failure to consider a meritorious argument is more like a failure to perform a ministerial act than a negligent exercise of judgment.

The history of the DFR in the Ninth Circuit demonstrates that the court's functional approach, like the approaches of the other circuits, has failed to produce a coherent general DFR standard of conduct capable of predictable application. The *Vaca* standard, holding a union liable for arbitrary conduct, has proven incapable of both definition and guiding lower court decisions. The state of confusion in the lower courts calls for Supreme Court clarification of *Vaca*. Unfortunately, as developed in the next section, the Court's recent DFR jurisprudence has only muddied the waters further.

II. The DFR Revisited: *CWA v. Beck*

Sections 8(a)(3) and 8(b)(2) of the NLRA make it an unfair labor practice for an employer and a union to discriminate in encouraging union membership. These sections, however, permit a union and employer to require employees, as a condition of employment, to join the union or pay it a fee equal to union dues. The provision of a collective bargaining agreement containing such a requirement is commonly called a "union security clause."

In *Communication Workers of America v. Beck*,[74] a sharply divided Supreme Court held that the NLRA prohibits a union from charging objecting fee-payers for political and ideological expenditures unrelated to collective bargaining. A unanimous Court also held that a federal district court has jurisdiction over objectors' challenges to the amount of their fees because such challenges allege a breach of the union's DFR. The Court recognized that

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[73] 931 F.2d 534 (9th Cir. 1991).
[74] 487 U.S. 735 (1988).

any direct claims of sections 8(b)(2) and 8(a)(3) violations fall within the primary jurisdiction of the NLRB.[75] Nevertheless, it found concurrent district court jurisdiction, reasoning:

> Respondents . . . claim that the union failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs. The necessity of deciding the scope of § 8(a)(3) arises because petitioners seek to defend themselves on the ground that the statute authorizes precisely this type of agreement.[76]

In *Beck*, the Court incorporated under the NLRA a rich body of First Amendment union security precedents, which it had developed under the Railway Labor Act and state public employee labor acts.[77] In its RLA cases, the Court held that the First Amendment restricted the use of union security fees collected under contracts between private employers and private unions because the RLA's preemption of state right-to-work laws provided the state action that rendered union security clauses enforceable.[78] The Court interpreted the RLA to prohibit charges for the expenditures that otherwise would be unconstitutional.[79] In its public sector cases, the Court faced the First Amendment issues directly.

The First Amendment cases established that compelled employee financial support of the exclusive bargaining representative does not unconstitutionally enforce ideological uniformity.[80] Expenditure of fees over fee-payer objection on political and ideological activities unrelated to collective bargaining, however, violates the First Amendment rights of fee-payers[81] and, derivatively, violates the RLA.[82]

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[75] *Id.* at 742–43.

[76] *Id.* at 743.

[77] *See* Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950 (1991); Ellis v. Brotherhood of Ry. and Airline Clerks, 466 U.S. 435 (1984); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956).

[78] *Hanson*, 351 U.S. at 225.

[79] *Street*, 367 U.S. at 740.

[80] *Hanson*, 351 U.S. at 225.

[81] *Abood*, 431 U.S. at 209.

[82] *Street*, 367 U.S. at 740.

The Court has defined the range of expenditures for which a union may charge objecting fee-payers as those expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative . . . ."[83] It has evaluated the chargeability of particular expenditures on a case-by-case basis.[84] It has articulated three elements for a chargeable expenditure: (1) that it be "germane to collective bargaining activity;" (2) that it be tied to the government's interest in promoting labor peace by avoiding free riders, i.e., employees who, in the absence of a union security clause, would receive the benefits of collective bargaining without paying their share of the costs; and (3) that it "not significantly add to the [burdens placed on] free speech" beyond those burdens inherent in allowing union security agreements.[85]

Prior to *Beck*, the Supreme Court had never addressed the applicability of its RLA and First Amendment case law to union security agreements under the NLRA. There were strong arguments that the RLA and First Amendments precedents did not apply. First, unlike the RLA, the NLRA does not preempt state right-to-work laws. Without the state action of right-to-work law preemption, a union security clause in a contract between a private firm and a private union would not be subject to First Amendment constraints. The need to avoid the First Amendment issue, which underlies the Court's RLA decisions, arguably is not present in the NLRA.

Second, although the RLA and NLRA have comparable union security provisions, they arrived at these provisions through completely opposite paths. As originally enacted, the RLA provided for "open shops." In 1950, Congress amended the RLA to authorize union security in response to union complaints about free riders. This legislative history led the Court to conclude that the RLA placed restrictions on union expenditure of objectors' fees.[86]

In contrast, the NLRA, as originally enacted, permitted a "closed shop." In enacting the Taft-Hartley Act amendments, Con-

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[83] Ellis v. Brotherhood of Ry. and Airline Clerks, 466 U.S. 435, 448 (1984).

[84] Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1959 (1991). Justice Scalia criticized this approach as "calculated to perpetuate give-it-a-try litigation of monetary claims that are individually insignificant but cumulatively worth suing about . . . ." *Id.* at 1975 (Scalia, J., concurring in part, dissenting in part).

[85] *Id.* at 1959.

[86] *Street*, 367 U.S. at 759–64.

gress expressed concern that a closed shop enabled a union to preclude an employer from hiring, and forced an employer to fire people that the union did not like. Congress prohibited the closed shop and substituted the union shop to stop these abuses. Congress arguably accomplished this goal without restricting expenditure of union security fees.

Three of the justices in *Beck* found these arguments persuasive.[87] Five of the ten judges of the *en banc* Court of Appeals for the Fourth Circuit[88] and a panel of the Second Circuit Court of Appeals[89] also agreed that the NLRA does not restrict expenditures of union security fees. Although the *Beck* majority ultimately rejected this position, it cannot be said that the position was unreasonable.

Beck held that the union breached its duty of fair representation by negotiating and enforcing a union security clause that allowed it to exact fees from objectors for nonchargeable expenditures. In negotiating the clause at issue in *Beck*, the union believed that the NLRA authorized union security fees equal to regular union dues regardless of the way in which the union spent the money.[90]

The Court never discussed the reasonableness of the union's legal position or the reasonableness of the union's judgment that the union security clause advanced the interests of the bargaining unit. The only reason the Court in *Beck* held that the union breached its duty of fair representation was the majority's disagreement with the union's legal interpretation of the NLRA's authorization of union security fees. In other words, the Court imposed a DFR standard of strict liability.

Future DFR union security litigation will focus on the chargeability of particular union expenditures. Social activities and lob-

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[87] Communication Workers of America v. Beck, 487 U.S. 735, 763 (1988) (Blackmun, O'Connor and Scalia, J.J. concurring in part, dissenting in part).

[88] Communication Workers of America v. Beck, 800 F.2d 1280, 1282 (1986) (Murnaghan, J. concurring) (finding no § 8(a)(3) violation, although finding an independent DFR breach); *id.* at 1290 (Winter, C.J., dissenting, joined by Hall, Philips and Sprouse, J.J.) (finding no § 8(a)(3) violation or DFR breach).

[89] Price v. United Auto Workers, 795 F.2d 1128 (2d Cir. 1986), *vacated*, 487 U.S. 1229 (1988).

[90] Not only was this the union's position in the litigation, it appears to have been its belief in fact. The union did not establish any record keeping that classified expenditures by their chargeability. Consequently, when called upon to prove its chargeable expenditures, the union was able to justify a fee that was equal to only 21% of regular dues. In subsequent years, however, the union, having redesigned its record keeping, was able to prove a fee equal to 80–85% of regular dues. *Beck*, Petition for Certiorari at 4–5.

bying on workplace issues, two expenditures on which the Supreme Court has ruled, illustrate that the reasonableness of the union's judgment that an expenditure furthers the bargaining unit's interest and of its position that the expenditure is chargeable are irrelevant to determining under *Beck* if a union has breached its DFR.

Lobbying on workplace issues furthers the interests of bargaining unit members more directly than social events. Union-sponsored social events are "not central to collective bargaining."[91] Lobbying, however, may have a substantial impact on terms and conditions of employment and is protected therefore by section 7 of the NLRA. An employer must allow the union to distribute literature supporting lobbying on company property during nonworking time in nonworking areas.[92] Prior to the Supreme Court's ruling on lobbying, most lower courts confronting the issue in public sector cases afforded unions a wide range of issues on which they could charge objecting fee-payers for lobbying.[93]

Thus, before the Court addressed the chargeability of lobbying and social events, a union reasonably could have concluded that charges for lobbying were lawful. A conclusion that charges for lobbying advanced the interests of the bargaining unit would be more reasonable than a similar conclusion regarding charges for social events. Nevertheless, the Court has held charges for social events to be lawful, largely because their communicative content is minimal,[94] and has held that charges for lobbying are illegal because of their express ideological content.[95] Moreover, a union considering charges for activities that the Court has yet to address cannot assess its potential DFR liability based on the positions that the expenditures further the employees' interests or that the charges are lawful. It must guess how the Supreme Court will evaluate the ideological and communicative content of its activities. If it guesses incorrectly, the union will be held strictly liable.

Beck's strict liability DFR standard in negotiating and enforcing a contract is unprecedented. Furthermore, *Beck*'s holding that

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[91] Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, 466 U.S. 435, 449 (1984).

[92] Eastex, Inc. v. National Labor Relations Board, 437 U.S. 556 (1978).

[93] For a discussion of lower court treatment of the chargeability of lobbying prior to *Lehnert*, *see* Martin H. Malin, *The Evolving Law of Agency Shop in the Public Sector*, 50 OHIO ST. L.J. 855, 875–80 (1989).

[94] *Ellis*, 466 U.S. at 465.

[95] Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1953–54 (1991).

the union breached its DFR in enforcing the union security clause is contrary to the Court's rejection of strict liability in enforcing contracts in *Humphrey* and *Vaca*.[96] Although, in *Vaca*, the Court refused to hold the union liable when it disagreed with the union's evaluation of the merits of a grievance, the *Beck* Court held the union liable merely because it disagreed with the union's interpretation of NLRA section 8(a)(3). *Beck*'s holding that the union breached its DFR in negotiating the union security clause is contrary to the Court's most recent DFR negotiation decision, *Air Line Pilots Association v. O'Neill*.[97]

O'Neill arose out of the Air Line Pilots Association's (ALPA's) unsuccessful 1983 strike against Continental Air Lines. Almost two years after the strike began, Continental, which had continued operating with replacements and cross-overs, posted a bid for 441 future captain and first officer vacancies, and purported to award the vacancies to the non-striking pilots. ALPA and Continental then settled the strike with an agreement that offered striking pilots three options: (1) severance pay, (2) retention of their claims against Continental, or (3) waiver of their claims against Continental in exchange for eligibility for a limited number of captain positions, which had been awarded under the bid to working pilots.

The Fifth Circuit held that a jury could find that ALPA acted arbitrarily by agreeing to a settlement that it knew left striking pilots worse off than they would have been had ALPA unilaterally ended the strike.[98] The court reasoned that the captain and first officer vacancies were not filled merely by awarding the positions after a bid, but could only become filled after the pilots were trained and actually had served in the positions.[99] In the court's view, had the union merely made an unconditional offer to return to work, the striking pilots, because their seniority far exceeded that of the working pilots, would have been entitled to all of the captain positions in the bid, and would not have had to waive their claims against Continental.

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[96] *See supra* notes 16–34 and accompanying text.

[97] 111 S. Ct. 1127 (1991).

[98] O'Neill v. Air Line Pilots Ass'n, 886 F.2d 1438 (5th Cir. 1989), *rev'd*, 111 S. Ct. 1127 (1991).

[99] *Id.* at 1446, *citing*, ALPA v. United Air Lines, Inc., 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

The Supreme Court reversed. Because of strong federal policies favoring peaceful settlement of labor disputes and avoidance of judicial supervision of the end products of collective bargaining, the Court held that the "final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary."[100] The Court further held that the rationality of the union's decision must be evaluated in light of the state of the law at the time of the negotiations.[101] It found that the law concerning the rights of returning strikers to the captain positions was not so clearly in the union's favor as to render the settlement irrational. The Court concluded that the settlement was rational because it provided prompt access to a portion of the captain positions without the costs and risks of litigation.[102] Thus, it found the Fifth Circuit's conclusion that the strikers would have been legally entitled to all of the captain positions had ALPA simply called off the strike to be irrelevant.[103]

O'Neill's holding cannot be reconciled with *Beck*. Under *O'Neill*, the union security clause the Communication Workers negotiated in *Beck* may constitute evidence that the union breached its duty of fair representation only if it is so outside a wide range of reasonableness as to be irrational. The clause's rationality must be evaluated in light of the state of the law at the time the clause was negotiated. Given the absence of Supreme Court precedent at the time, and the subsequent division among lower courts and the Justices of the Supreme Court over whether the NLRA places any restrictions on union expenditure of union security fees,[104] the union's conclusion that it could lawfully negotiate the clause was not irrational. *Beck*'s apparent holding[105] that unions are strictly liable for their legal conclusions concerning the chargeability of particular activities is inconsistent with the *O'Neill* Court's evaluation of the ALPA's legal conclusions concerning whether the captain vacancies had been filled.

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[100] 111 S. Ct. at 1136 (citation omitted).

[101] *Id.*

[102] *Id.* at 1136 n.10, 1137.

[103] For purposes of analyzing ALPA's DFR liability, the Court assumed that the strikers would have been offered all of the captain positions in order of seniority had ALPA terminated the strike. *Id.* at 1136.

[104] *See supra* notes 87–89 and accompanying text.

[105] *See supra* note 90 and accompanying text.

It is not surprising that *Beck* is inconsistent with the general DFR law of contract negotiation and contract enforcement. Union security fee disputes do not involve contract negotiation or contract enforcement. Fee-payers have no legal basis for objecting to the negotiation of union security clauses or to their enforcement by collection of the fees, even where the collection is coerced by threat of discharge. The Court has repeatedly held that fee-payers' objections arise out of fee expenditure rather than fee collection.[106] If the union restricts its expenditures to chargeable activities, fee-payers have no claim. Indeed, in *Beck*, Justice Brennan initially stated the issue presented as whether the NLRA permits a union to spend agency shop fees on matters not related to collective bargaining and, "if so, whether *such expenditures* violate the union's duty of fair representation . . . ."[107] Justice Brennan never answered this question. He chose, instead, to characterize the DFR breach as arising out of contract negotiation and enforcement rather than out of fee expenditure.

Had Justice Brennan analyzed the issue that he initially set out, he would have found it difficult to conclude that the DFR encompassed union expenditure of the fees it collects pursuant to a union security clause. Because the DFR derives from the union's status as exclusive bargaining representative, it extends only to union activities undertaken in that capacity. A union receives the fees pursuant to collective bargaining agreements that it has negotiated and expends considerable portions of the fees on its performance of exclusive representative functions, but its decisions regarding fee expenditures are matters of internal affairs and are not made as exclusive representative.[108] Although the Court failed to confront this issue in *Beck*, it subsequently recognized that fee expenditure is not an exclusive representative function when it held in *Lehnert* that the range of chargeable expenditures is not limited to activities that the union is statutorily required to perform.[109]

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[106] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221–23 (1977).

[107] Communication Workers of America v. Beck, 487 U.S. 735, 738 (1988) (emphasis added).

[108] The NLRB and the D.C. Circuit Court of Appeals have recognized this and held that the amount of union security fees is not a mandatory subject of bargaining and unions have no statutory obligation to provide employers with information concerning fee expenditures. North Bay Development Disabilities Services, Inc. v. National Labor Relations Board, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 952 (1991).

[109] 111 S. Ct. at 1956–59.

Courts generally have refused to extend the DFR to cover internal union matters.[110] For example, in *Kolinske v. Lubbers*,[111] the D.C. Circuit held that eligibility for strike benefits is an issue of internal union rules and structure and is not subject to the DFR, even though union security fees partially fund the benefits. Had the court reached a contrary holding, it would have deprived the union of the ability to provide incentives for individual employees to aid the union's strike efforts actively and could have subjected a range of internal union decisions to DFR scrutiny.

Thus, fee-payers have no basis for complaining about union security clause negotiation or enforcement, and the DFR does not cover fee expenditure, the one matter on which fee payers may base a claim. The restrictions on fee expenditure derive directly from sections 8(a)(3) and 8(b)(2) of the NLRA. Those sections prohibit, *inter alia*, discrimination to encourage union membership, but they exempt union security clauses in collective bargaining agreements. The *Beck* Court limited the exemption to fees expended on chargeable activities. To the extent that the union spends objectors' fees on nonchargeable activities, it causes discrimination, which encourages union membership in violation of section 8(b)(2).[112] The *Beck* Court correctly held that the alleged section 8(a)(3) violation was subject to the NLRB's exclusive primary jurisdiction.[113] The Court erred, however, by distorting DFR law to create, effectively, a private section 8(b)(2) cause of action.

III. The Result Orientation of the Supreme Court's DFR Jurisprudence

The Court's holding in *Beck* that union security fee disputes implicate a union's duty of fair representation is anomalous when considered in light of the Court's overall DFR jurisprudence. To explain *Beck*, it is necessary to examine it in light of other situa-

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[110] *See, e.g.*, Hovan v. Carpenters, 704 F.2d 641 (1st Cir. 1983); Bass v. Boilermakers, 630 F.2d 1058 (5th Cir. 1980).

[111] 712 F.2d 471 (D.C. Cir. 1983).

[112] This is not the only example of internal union decisions giving rise to unfair labor practices. *See, e.g.*, Pattern Makers League v. National Labor Relations Board, 473 U.S. 95 (1985) (union rules restricting ability of employees to resign union membership violate § 8(b)(1)(A)); National Labor Relations Board v. Marine & Ship Building Workers, 391 U.S. 418 (1968) (union disciplinary action against member for complaining to NLRB without first exhausting internal union remedies violates § 8(b)(1)(A)).

[113] 487 U.S. at 742–44.

tions in which the Court has found DFR breaches. Except for *Beck* and *Breininger v. Sheet Metal Workers International Association Local 6*,[114] every case in which the Court has found a DFR breach involved claims of racial discrimination.

Steele v. Louisville & Nashville Railroad,[115] for example, was litigated as a civil rights case.[116] The Court's creation of the DFR in this case enabled it to avoid the plaintiff's attack on the constitutionality of the Railway Labor Act.[117] The union's negotiation to eliminate the jobs of black workers and replace them with white workers was illegal not because it denied black workers equal protection, but because it based an employment decision on a distinction, *i.e.*, race, that was not relevant to the workplace. This judicial creativity in statutory construction enabled the Court to respond to post-World War II, heightened concerns with racial discrimination in a non-racially based manner.[118] It also enabled the Court to craft a tool for combatting union-management discrimination without reaching unilateral union conduct.[119]

The Court's efforts to develop a cause of action for union-management discrimination, couched in language of a general duty, led it to retreat from *Steele* in one case and to greatly expand *Steele* in another. The retreat came in *Ford Motor Co. v. Huffman*,[120] where the Court held that the union did not breach its DFR by agreeing to grant seniority credit for pre-employment military service. The Court, however, never explained why pre-employment military service, regardless of the similarity between

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[114] 493 U.S. 67 (1990).

[115] 323 U.S. 192 (1944).

[116] For a discussion of the use of *Steele* by the civil rights community as part of its attack on the "separate but equal" doctrine, see Karl Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives From Labor Law and Civil Rights*, 61 OR. L. REV. 157, 185–87 (1982).

[117] *See supra* notes 9–10 and accompanying text.

[118] *See* Freed et al., *supra* note 5, at 468–69 n.15; James E. Jones, *The Origins of the Concept of the Duty of Fair Representation*, *in* THE DUTY OF FAIR REPRESENTATION 25, 26–27 (Jean T. McKelvey ed., 1977).

[119] Several commentators have observed that the Court was avoiding striking down common union policies of excluding blacks from membership or relegating them to second class segregated locals. Klare, *supra* note 116, at 188–91; Cornelius Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 31–33 (1983); Madelyn Squire, *The National Labor Relations Act and Unions' Invidious Discrimination—A Case of a Would Be Constitutional Issue*, 30 HOW. L.J. 783 (1987). Professors Klare and Peck have observed that the Court's approach was consistent with its "go slow" approach to racial discrimination, recognizing the need to attack it but realizing the political difficulties of a thorough attack. Klare, *supra* note 116, at 188 n.124; Peck, *supra* at 32.

[120] 345 U.S. 330 (1953).

the military position and the job, was relevant for making seniority distinctions in the workplace.[121] Strong arguments can be made that because of the importance of seniority rights to the job security of the individual employee, courts should closely scrutinize agreements that effectively reduce those rights,[122] and that pre-employment military service is no more relevant for distinguishing seniority rights than race.[123]

The parties argued that they needed the flexibility to grant seniority credit for pre-employment military service to prevent potential unrest resulting from the military veterans' belief that they were entitled to seniority credit for their military service, regardless of whether they had worked for the company before joining the military.[124] The Court appeared to accept this argument, for it opined that unions must be given "[a] wide range of reasonableness . . . in serving the bargaining unit . . . ."[125]

The need to respond to workplace unrest, however, does not provide a basis for distinguishing *Huffman* from *Steele*. It cannot be said that white employees in *Steele*, who believed that they should receive the higher paying locomotive firemen jobs ahead of more senior black employees, posed less of a threat of workplace unrest than the newly hired veterans in *Huffman*, who believed that they ought to be given seniority credit for military service. As Professor Matthew Finkin has observed, the only factor that distinguishes *Steele* is the Court's view of legal and social policy.[126]

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[121] The Court merely listed "time or labor devoted to related public service whether civil or military," as a relevant basis on which unions could agree to make distinctions among employees. *Id.* at 338–39.

[122] *See* Alfred Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1476–82 (1963); Alfred Blumrosen, *Union-Management Agreements Which Harm Others*, 10 J. PUB. L. 345 (1961).

[123] *See* Matthew Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 208–09 (1980); Freed et al., *supra* note 5, at 469 n.16.

[124] Finkin, *supra* note 123, at 209 n.113, quoting the company's and union's briefs.

[125] 345 U.S. at 338.

[126] *See* Finkin, *supra* note 123, at 209. The Court essentially acknowledged this in *Huffman*:

> The public policy and fairness inherent in crediting employees with time spent in military service in time of war or national emergency is so clear that Congress, in the Selective Training and Service Act of 1940, required . . . that employees who left their private civilian employment to enter military service should receive seniority credit for such military service . . . . There is little that justifies giving such a substantial benefit to a veteran with brief prior civilian employment that does not equally justify giving it to a veteran who was inducted into military service before having a chance to enter any civilian employment, or to a veteran

Consequently, as the judicial view of good social policy changes, so does the duty of fair representation. For example, in 1938, the Michigan Supreme Court justified blatant sex discrimination in *Hartley v. Brotherhood of Railway and Steamship Clerks*,[127] a pre-*Steele* decision that the *Huffman* Court cited with approval.[128] The collective bargaining agreement provided for reductions in accordance with seniority. In response to layoffs caused by the Depression, employees protested to the railroad that "married women were retained . . . while others, who had no other source of income, were dismissed . . . ."[129] Consequently, the railroad and union agreed that all married women would be terminated, effective March 16, 1932, unless there were extenuating circumstances, and that any single woman would be terminated upon getting married. Hartley, a married woman who acquired seniority rights under the collective bargaining agreement, sued the union when she was terminated pursuant to the subsequent revision of that agreement. The Michigan Supreme Court rejected Hartley's claim, citing the need to amend the collective bargaining agreement in the manner described to quell workplace unrest.[130]

In 1938, employment discrimination against married women comported with general social policy.[131] Today, gender bias in

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who never worked for the particular employer who hired him after his return from military service. The respective values of all such veterans, as employees, are substantially the same. From the point of view of public policy and industrial stability, there is much to be said, especially in time of war or emergency, for allowing credit for all military service. Any other course adopts the doubtful policy of favoring those who stay out of military service over those who enter it.

345 U.S. at 339.

[127] 277 N.W. 885 (Mich. 1938).

[128] 345 U.S. at 339.

[129] 277 N.W. at 886.

[130] The court wrote:

> A different situation might be presented had the agreement of 1932 been accomplished as a result of bad faith, arbitrary action, or fraud directed at plaintiff on the part of those responsible for its execution. No claim or showing of such a nature is made in this case. The Railway notified the . . . Brotherhood . . . that the protests against the retention of married women in its employ was [sic] becoming so acute as to result in a serious impairment of personnel relations, and that it was imperative that the situation be corrected. Meetings were held, and the majority vote of those in attendance favored the present agreement.

Id. at 887.

[131] *See* Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 161 (1957) (defending the result in *Hartley* as fair because the discharge of married women during a "serious depression" was "roughly calculated to increase the likelihood that there will be one bread winner in every family").

contract negotiation or administration clearly breaches the DFR.[132] Thus, the workplace relevance of the distinctions a union draws may be a euphemism for the types of discrimination that a court wishes to outlaw.

In its efforts to provide a remedy for union-management racial discrimination, the Court engaged in a "startling"[133] expansion of the DFR. In *Brotherhood of Railway Trainmen v. Howard*,[134] the Court held that a union owed a DFR to employees outside the bargaining unit the union represents.

Howard involved the "Frisco Railroad," which for many years maintained two racially segregated classes of workers. White brakemen and black train porters performed the same duties, except that train porters also helped passengers board trains, cleaned the passenger coaches, worked only on passenger trains and performed braking work only at the head end. With train porters on the passenger trains, the railroad did not have to employ a head-end brakeman.[135] The all-white Brotherhood of Railway Trainmen (BRT) represented the railroad's brakemen, while the all-black Brotherhood of Trainmen, Brakemen, Porters, Switchmen, Firemen and Railway Employees represented the train porters.

In 1944 the BRT obtained, by threat of strike, a provision in its collective bargaining agreement prohibiting the railroad from allowing train porters to perform brakeman work on passenger trains. The railroad decided it was no longer economical to retain the train porters and notified them that their jobs were being eliminated. The train porters sued to enjoin the BRT contract.

The Supreme Court held that the BRT breached its DFR and invalidated the BRT contract. The Court considered it irrelevant that the BRT was not the train porters' exclusive bargaining representative.[136] The Court reasoned that the black train porters

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[132] *See, e.g.*, Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1085–87 (9th Cir. 1991); Farmer v. ARA Serv., 660 F.2d 1096, 1103–04 (6th Cir. 1981); Local 106, Glass Bottle Blowers Ass'n, 210 N.L.R.B. 943 (1974), *enforced*, 520 F.2d 693, 697 (6th Cir. 1975); Pacific Maritime Ass'n, 209 N.L.R.B. 519 (1974).

[133] Jones, *supra* note 118 at 31.

[134] 343 U.S. 768 (1952).

[135] Howard v. Thompson, 72 F. Supp. 695, 696 (E.D. Mo. 1947), *rev'd sub nom.* Howard v. St. Louis-San Francisco Ry., 191 F.2d 442, (8th Cir. 1951), *aff'd sub nom.* Brotherhood of Ry. Trainmen v. Howard, 343 U.S. 768 (1952).

[136] The Court stated:

> In this case, unlike the *Steele* case, the colored employees have for many years been treated by the carriers and the Brotherhood as a separate class for represen-

faced loss of their jobs "because they are not white and for no other reason,"[137] and declared broadly, "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers."[138] Thus, the Court reached out to strike down racial discrimination by creating a duty owed to employees outside the bargaining unit that the union represents.

The Court's holding in *Howard*, that a union owes a statutory duty to employees it does not represent, is potentially limitless. Under *Howard*, a union that represents a bargaining unit confined to full-time employees could be liable when it negotiates for expanded job opportunities within the unit, knowing that this will eliminate the jobs of non-unit part-timers.[139] Similarly, a supervisor could sue a union for negotiating contract provisions that adversely affect the supervisor's employment.[140]

Courts confronted with facts raising *Howard's* broad implications generally have ignored the decision. Without even citing, much less discussing, *Howard*, lower courts have held that a union owes no duty of fair representation to supervisors[141] and job ap-

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> tation purposes and have in fact been represented by another union of their own choosing. Thus since the Brotherhood has discriminated against "train porters" instead of minority members of its own "craft," it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power to abolish the jobs of the colored porters and drive them from the railroads. We think the argument is unsound and that the opinion in the *Steele* case itself points to a breach of statutory duty of this Brotherhood.

343 U.S. at 773.

[137] *Id.*

[138] *Id.* at 774.

[139] *Cf.* New York Univ., 205 N.L.R.B. 4, 12 (1978) (Fanning, Member dissenting) (exclusion of part-time employees from full-time bargaining unit places them at the mercy of the full-timers).

[140] *See* Cooper v. General Motors Corp., 651 F.2d 249 (5th Cir. 1981). Recognizing *Howard*'s potential folly, Professor Archibald Cox has suggested that it be confined to its facts, interpreting it, in accordance with the Eighth Circuit's opinion in the case, which avoided expanding the DFR by analyzing the issue as one involving a merger of bargaining units. Cox, *supra* note 131, at 158–59; *see also* Jones, *supra* note 118, at 32 (a respectable argument for confining *Howard* to cases of invidious discrimination can be made). The Supreme Court, however, never mentioned the Eighth Cricuit's analysis, and other commentators have read *Howard* more broadly. For example, Professors William Gould and Michael Sovern have interpreted *Howard* as imposing a DFR toward job applicants, at least with respect to barring racial discrimination. William Gould, BLACK WORKERS IN WHITE UNIONS 194–95 (1977); Michael Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563, 584–86 (1962).

[141] *See, e.g.*, McTighe v. Mechanics Educational Society Local 19, 772 F.2d 210, 213 (per curiam) (6th Cir. 1985); *Cooper*, 651 F.2d at 250.

plicants,[142] and that a local union enforcing provisions of a multi-local, multi-employer collective bargaining agreement owes no duty of fair representation to other employees in the unit who are represented by other locals.[143] In most of these cases, the plaintiffs alleged that the union's conduct adversely affected their employment rights in ways that, although not racially motivated, were similar to those invalidated by the *Howard* Court.

Yet the courts have not totally ignored *Howard*. The decision has figured prominently in cases concerning the DFR and retirees.[144] In *Allied Chemical Alkali Workers v. Pittsburgh Plate Glass Co.*,[145] the Supreme Court held that retirement benefits are not a mandatory subject of bargaining under the NLRA because retirees are not employees under the NLRA. The Court recognized the potential conflict between its holding and *Howard*'s imposition of a DFR extending beyond the bargaining unit. Although it could have used this as an opportunity to overrule *Howard*, the Court did not do so; instead, it characterized *Howard* as precluding a union from using its exclusive representation power to discriminate racially against employees outside the bargaining unit.[146] The Court described the reach of *Howard*'s holding as "a matter of some conjecture,"[147] and as imposing no affirmative obligation on a union to represent individuals not within the bargaining unit.[148]

The Court's failure to overrule *Howard* left open the question of whether a union violates the DFR if it voluntarily represents individuals outside the bargaining unit. Such representation frequently occurs with retirees. Although retiree fringe benefits are not a mandatory subject of bargaining, their negotiation is permitted if union and employer consent. Furthermore, unions often seek to enforce collectively bargained retirement benefits on behalf of the retirees.[149] The lower courts are in a state of disarray as to

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[142] *See, e.g.*, Karo v. San Diego Symphony Orchestra Ass'n, 762 F.2d 819, 821 (9th Cir. 1985); Gray v. International Ass'n of Heat & Frost Insulators Local 51, 416 F.2d 313, 316 (6th Cir. 1969).

[143] Walker v. Consolidated Freightways, 930 F.2d 376, 382 (4th Cir. 1991).

[144] *See generally* Robert S. Bates, *Benefits of Retirees: Negotiations and the Duty of Fair Representation*, 21 J. MARSHALL L. REV. 513 (1988).

[145] 404 U.S. 157 (1971).

[146] *Id.* at 181 n.20.

[147] *Id.*, *citing* Cox, *supra* note 131.

[148] *Id.* at 181 n.20.

[149] *See* Bates, *supra* note 144 at 514.

whether, in undertaking such negotiation and enforcement efforts, a union owes its retirees a duty of fair representation.[150]

Determination of whether a union owes a DFR to retirees not only affects the union's liability, it also affects the retirees' ability to protect their interests. If a union owes retirees no duty, retirees may sue their former employer without resorting to the collectively bargained grievance procedure;[151] may compromise their claims with their former employer without giving the union notice;[152] and may have the benefit of a longer statute of limitations than if they were bringing a hybrid DFR/breach of contract claim.[153] If a union owes no DFR to retirees, the DFR would not preempt state tort law, which might govern the quality of representation that the union voluntarily decides to provide retirees.[154] Thus, the imposition of a DFR toward retirees may actually reduce their level of protection.

If the union's duty of fair representation derives from its status as exclusive bargaining representative, it would appear axiomatic that a union owes no DFR to individuals for whom it is not exclusive representative. *Howard*'s legacy, at least with respect to the retiree-union relationship, is substantial uncertainty and the possibility of DFR treatment inconsistent with general DFR doctrine.[155]

Regardless of how the retiree issue is ultimately resolved, it is clear that the first twenty years of the Supreme Court's DFR jurisprudence were dominated by the Court's result orientation. The Court created, twisted and distorted the duty of fair representation to provide a civil rights remedy dressed in labor law clothing.

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[150] *Compare* United Indep. Flight Officers v. United Air Lines, 756 F.2d 1262 (7th Cir. 1985) with Arnold v. Northwest Airlines, 774 F.2d 1169 (8th Cir. 1985) *and* Nedd v. United Mine Workers, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (limited in Ambromovage v. United Mine Workers, 726 F.2d 972 (3d Cir. 1984)); *compare also* Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975) with Anderson v. Alpha Portland Indus., Inc., 727 F.2d 177 (8th Cir. 1984), *aff'd on rehearing*, 752 F.2d 1293 (8th Cir.), *cert. denied*, 471 U.S. 1102 (1985) and United Auto Workers v. Yardman's Inc., 716 F.2d 1476 (6th Cir. 1983) *cert. denied*, 465 U.S. 1007 (1984).

[151] Anderson v. Alpha Portland Industries, Inc., 727 F.2d 177, 185 (8th Cir. 1984), *aff'd on rehearing*, 752 F.2d 1293 (8th Cir.) (*en banc*), *cert. denied*, 471 U.S. 1102 (1985).

[152] United Auto Workers v. Yardman's, Inc., 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

[153] *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 432–33 (1988).

[154] *See* United Steelworkers v. Rawson, 110 S. Ct. 1904 (1990); Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986).

[155] *See* Bates, *supra* note 144, at 536.

As Professor James Jones has observed, Title VII of the 1964 Civil Rights Act provided more direct and comprehensive prohibitions of union racial discrimination and eliminated the necessity to strain DFR doctrine to provide a civil rights remedy. Professor Jones predicted that this would free the system to examine the DFR as a general union duty and would thereby facilitate focusing of judicial attention on the claims of individual workers over the quality of union representation.[156] Unfortunately, the Court's sole excursion prior to *Beck* into the general duty produced *Humphrey* and *Vaca* which, stripped of their broad rhetoric, merely rejected state court attempts to impose strict liability in the guise of the DFR.[157]

Beck's holding that the union breached its DFR by negotiating and enforcing a union security clause is inconsistent with general principles of DFR and union security law.[158] In light of *Howard*'s distortion of DFR law, this inconsistency strongly suggests result orientation. The motive behind this result orientation can be found within the *Beck* opinion, and its potential breadth and folly is revealed in the Court's subsequent opinion in *Breininger*.

The original Fourth Circuit panel in *Beck* found the Supreme Court's RLA union security precedents controlling under the NLRA in every way. The court reasoned that the language of the two statutes was nearly identical and that they shared the common legislative purpose of allowing unions to force non-union employees to pay their share of the costs of union representation in collective bargaining.[159] Similarly, the court reasoned that because district courts have jurisdiction over claims under section 2 Eleventh of the RLA, they must also have jurisdiction over claims under section 8(a)(3) of the NLRA.[160]

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[156] Jones, *supra* note 118, at 35–36.

[157] *See supra* notes 16–34 and accompanying text. This is not to suggest that the rejection of a strict liability DFR standard was not significant. Prior to *Vaca*, strong arguments, based on Smith v. Evening News Ass'n, 371 U.S. 195 (1962) and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), were made that unions were required to process all grievances, or at least all arguably meritorious grievances, to arbitration if the individual grievant insisted. *See* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362 (1962).

[158] *See supra* notes 96–109 and accompanying text.

[159] Beck v. Communication Workers of America, 776 F.2d 1187, 1204 (4th Cir. 1985), *aff'd on rehearing*, 800 F.2d 1280 (4th Cir. 1986) (*en banc*), *aff'd*, 487 U.S. 735 (1988).

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> In the case *sub judice* plaintiffs pled jurisdiction under section 1337 and challenged CWA's expenditures both under section 8(a)(3) as construed by the Supreme Court and as violative of its duty of fair representation. Consequently the district court properly exercised jurisdiction over this matter. In addition, were

The Supreme Court agreed with the Fourth Circuit panel that the parallel language and legislative purpose required that section 8(a)(3) be read to incorporate the same limitations on union security fees as RLA section 2 Eleventh.[161] However, other sections of the RLA use language that tracks other NLRA unfair labor practices. To agree with the Fourth Circuit, that the language in the NLRA comparable to an RLA provision permits a district court to exercise jurisdiction over the unfair labor practice, potentially could obliterate the NLRB's exclusive primary jurisdiction over unfair labor practices.

The Court, however, could not hold that the dispute was within the NLRB's primary jurisdiction. To do so, as the Fourth Circuit panel observed, would give unequal rights to RLA and NLRA employees. RLA employees objecting to fee expenditures would be able to sue their unions in district court, but NLRA employees with similar objections would be at the mercy of the NLRB general counsel's unreviewable discretion over the issuance of unfair labor practice complaints.[162]

The Court solved its dilemma by taking a square peg, the union security fee dispute, and forcing it into a round hole, a DFR claim. This enabled it to rely on its prior holding in *Vaca* that DFR claims do not fall within the NLRB's primary jurisdiction. To do so, the Court had to twist a claim involving fee expenditure into a complaint over the negotiation and enforcement of the union security clause itself, thereby distorting general union security principles. It then had to distort general DFR principles to render the claim actionable. As a result, although *Beck* is inconsistent with DFR law generally, it is quite consistent with the Court's

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> this not so, it is difficult to find jurisdiction in *Ellis*, which was filed initially in federal district court, just as this case. That case was exactly like this case, save that it was brought under section 2 Eleventh and this one under section 8(a)(3). But, as we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2 Eleventh in *Ellis* (and that could be the only basis for jurisdiction since the Supreme Court found it unnecessary to consider the constitutional claim), by the same token there is jurisdiction under section 8(a)(3) here. In short, jurisdiction can only be denied in this case if it is to be denied in *Ellis*.

Id. at 1204–05 (footnote omitted).

[161] *Beck*, 487 U.S. at 747–54.

[162] National Labor Relations Board v. United Food and Commercial Workers Union, Local 23, 484 U.S. 112 (1987); 29 U.S.C. §§ 153, 160 (1982).

prior use of DFR law. Just as the Court contorted DFR law to craft a pre-Civil Rights Act claim for racial discrimination, it has twisted DFR law to provide for parallel remedies in RLA and NLRA union security fee cases.

The potential extent of the Supreme Court's new result orientation was revealed in *Breininger*, where the Court held that a complaint over discriminatory referrals from a non-exclusive hiring hall[163] stated a DFR claim subject to district court jurisdiction. The Court recognized that the NLRB had interpreted sections 8(b)(1)(A) and 8(b)(2) to restrict unions to using only relevant objective characteristics in determining hiring hall referral priority, and to prohibit any departures from a hiring hall's established procedures.[164] The Court, however, viewed *Vaca* and *Beck* as controlling, and held that Breininger's complaint of discrimination in hiring hall referrals did not fall within the NLRB's primary jurisdiction,[165] and that it stated a claim for breach of the DFR.[166]

In analyzing the DFR issues, the *Breininger* Court distinguished the DFR from the NLRA's unfair labor practices. It indicated that although the DFR may be applied to activities that are also regulated by section 8(b), conduct arising out of those activities may breach the DFR even though it does not amount to an unfair labor practice under section 8(b).[167] Later, the Court suggested that in exclusive hiring halls, a union might breach its DFR if it failed to provide procedural safeguards against discrim-

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[163] Union-operated hiring halls typically are found in industries, such as construction and longshoring, where jobs are of relatively short duration. Employees sign up with the hiring hall, which refers them to jobs in accordance with requests from employers. For the employee, the hiring hall usually provides a necessary link to the industry and the job market. For the employer, it can provide easy access to skilled workers. A hiring hall is exclusive if the collective bargaining agreement requires the employer to obtain all, or a percentage, of its work force from the hall. A hiring hall is nonexclusive if the collective bargaining agreement allows the employer to hire any employees it wishes from other sources, including direct solicitations by job applicants. Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 71 n.1 (1989).

[164] *Id.* at 75 n.3.

[165] *Id.* at 73–84.

[166] *Id.* at 89.

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> [W]e reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice . . . . Pegging the duty of fair representation to the Board's definition of unfair labor practices would make the two redundant, despite their different purposes, and would eliminate some of the prime virtues of the duty of fair representation—flexibility and adaptability.

Id. at 86 (citations omitted).

inatory treatment, even though the Court had previously held that such safeguards are not required by section 8(b).[168]

The Court also rejected the union's argument that no DFR attached in making hiring hall referrals, because a union performs a traditional employer function and, therefore, does not represent employees. The Court reasoned that a union is able to make hiring hall referrals only because of its status as exclusive bargaining representative and through its power granted in the collective bargaining agreement. The Court characterized the union's hiring hall referrals as administration of the collective bargaining agreement, subject to the DFR.[169] It opined that the absence of an employer interest in regulating the union's hiring hall referral power increased the level of the union's responsibility under its DFR.[170]

Breininger signals a potential broadening of the DFR beyond the union's status as exclusive bargaining representative as was the case in *Howard*.[171] In *Howard*, the Court expanded the DFR beyond the union's exclusive bargaining function by holding that the union owed a duty to employees it did not represent. In *Breininger*, the Court similarly expanded the DFR beyond the union's functions as exclusive representative.

The Court accepted lower court findings that the hiring hall was nonexclusive, that employers were free to hire without going through the hiring hall, and that employees were free to solicit

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[168] *Id.* at 89 n.12, discussing Teamsters v. National Labor Relations Board, 365 U.S. 667 (1961).

[169] *Id.* at 88–89.

[170] *Id.* The view that the absence of an employer's adverse interest to check union power raises the level of DFR responsibility may explain the Court's imposition of strict liability on the union in *Beck*. An employer's role under a union security provision is to collect and transmit the fees to the union and to discharge employees who fail to pay. It has no power to control how the union spends the fees. *See* North Bay Development Disabilities Services, Inc. v. National Labor Relations Board, 905 F.2d 476 (D.C. Cir. 1990) (amount of union security fees and how they are to be spent are not mandatory subjects of bargaining and union has no duty to provide employer with breakdown of fee expenditures). Indeed, an employer has a strong incentive to avoid any involvement in the union's administration of the union security provision. An employer who honors a union's wrongful demand to discharge an employee who has not paid union security fees does not commit an unfair labor practice unless it has reason to believe that the fees charged are unlawful. *See* H.C. Macaulay Foundry Co. v. National Labor Relations Board, 553 F.2d 1198, 1201–02 (9th Cir. 1977). An employer who involves itself in the union's administration of the union security provision may place itself on notice that the union is charging unlawful fees and render itself liable for wrongful discharge.

[171] Indeed, in discussing the increased need for a DFR regulating hiring hall referrals, the Court pointed to the need to protect prospective employees as well as current employees. 493 U.S. at 88. Prospective employees, however, are outside the bargaining unit.

employers directly for jobs.[172] Nevertheless, the Court failed to recognize the significance of the lower court's findings.

In administering a nonexclusive hiring hall, a union cannot be said to be serving as exclusive representative. Prospective employees have the option of relying on the hiring hall for job referrals, but they are not prohibited from dealing directly with employers in seeking employment. Only after they are hired do individuals become subject to the terms of the collective bargaining agreement. The absence of exclusive authority over the hiring function should dictate a finding that no duty of fair representation attaches.[173]

In contrast, in an exclusive hiring hall the DFR attaches immediately, because the contract gives the union exclusive control over the initial stage of the hiring process and prohibits direct dealing between employers and prospective employees. Individuals seeking employment are subject to the collective bargaining agreement immediately through registration with the hiring hall, in accordance with contractual provisions governing referrals. Because such individuals must go through the hiring hall, they are subject to the contract even though they are not working. Under these circumstances, they should not be considered merely job applicants. Because the union has exclusive control over the referral aspect of the hiring process, such individuals become members of the bargaining unit upon registering with the hall, and the union has a duty to represent them fairly.[174]

In holding that Breininger's complaint stated a claim for breach of the DFR, the Court did not consider the distinctions

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[172] *Id.* at 71. In his brief Breininger argued that the lower courts incorrectly characterized the hiring hall as nonexclusive and urged the Court to remand for additional findings on this issue. Brief for Petitioner at 20–22. *See also* Brief for Association for Union Democracy, Teamsters for a Democratic Union and Public Citizen as Amicus Curiae at 15 n.7 (suggesting that the characterization as nonexclusive was inconsistent with the language in the collective bargaining agreement).

[173] *See* United Bhd. of Carpenters & Joiners, Local 537 (E.I. Dupont de Nemours & Co.), 303 N.L.R.B. 67, 137 L.R.R.M. (BNA) 1249 (June 18, 1991). In *Dupont*, the Board held that no DFR attached to the union's operation of a non-exclusive hiring hall because the union did not control the employer's hiring process and, therefore, did not act as an exclusive representative when making job referrals. The Board did not mention *Breininger*. The Board's decision refers to the union and company as "parties to a contractual hiring arrangement," but does not mention a collective bargaining agreement. It is possible that the only agreement between the parties was for the use of the hiring hall; that is, that they had no general collective bargaining agreement. If that was the case, it might provide a basis for distinguishing *Breininger*.

[174] *See* MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 429 (1988).

between the union's roles in exclusive and non-exclusive hiring halls. The Court's holding that the DFR attaches to administration of all hiring halls regardless of their exclusivity is particularly remarkable because, as developed below, there was no reason for the Court to reach the substantive DFR issue.

The lower courts resolved the DFR claim strictly on jurisdictional grounds. The *Breininger* appeal presented only one jurisdictional issue: whether a DFR claim in hiring hall referrals fell within the exclusive jurisdiction of the NLRB. The union and Breininger, as well as the NLRB appearing as amicus curiae, argued that the substantive issue of whether the DFR attached at all to hiring hall referrals was irrelevant to the jurisdictional issue.

The union argued that even if the DFR attached to hiring hall referrals, claims for breach may only be brought before the NLRB. The union framed the issue as whether the Court should imply a private NLRA cause of action for arbitrary or discriminatory hiring hall referrals. It argued that the Court's prior decisions upholding district court jurisdiction over NLRA-DFR claims in contract negotiation and grievance handling[175] pre-dated and were inconsistent with more recent Supreme Court jurisprudence regarding private causes of action. Consequently, it urged the Court to confine district court jurisdiction over NLRA-DFR claims to those involving contract negotiation and grievance handling.[176]

The Court did not address the union's implied private right of action analysis. It mechanically applied *Vaca* and *Beck* and held that district court jurisdiction over NLRA-DFR claims is not confined to contract negotiation and grievance handling.[177] Once the Court reached this conclusion, the only issue remaining was whether the DFR claim was artfully pled to avoid the NLRB's exclusive jurisdiction. Resolving this issue did not require the Court to decide whether a DFR attaches to referrals from a non-exclusive hiring hall. Indeed, neither Breininger nor the NLRB asked the Court to so hold. Breininger, in his brief, argued that the district court had jurisdiction because the hiring hall referral system was "*arguably* within the scope of the union's duty of fair representation."[178] Breininger recognized that issues concerning

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[175] Vaca v. Sipes, 386 U.S. 171 (1967) (grievance handling); Syres v. Oil Workers, Local 23, 350 U.S. 892 (1955) (contract negotiation).

[176] Brief for Respondent at 29–41, *Breininger*, 493 U.S. 67 (1989).

[177] 493 U.S. at 74–77.

[178] Brief for Petitioner at 19, *Breininger*, 493 U.S. 67 (1989) (emphasis supplied).

whether the DFR attached to operation of a non-exclusive hiring hall existed, but did not address the merits. Instead, he urged the Court to instruct the district court on remand to reconsider its characterization of the hiring hall as nonexclusive.[179]

The NLRB urged the Court to hold that a court has jurisdiction despite the NLRB's oversight through section 8(b) as long as the DFR claim is colorable. The Board recognized that whether the DFR attaches to the operation of a non-exclusive hiring hall was problematic, but characterized the claim that it attaches as colorable and urged the Court to find jurisdiction and remand for lower court consideration of the merits of the DFR issue.[180]

Nevertheless, the Court reached the merits of the substantive DFR issue. It did so in response to the union's argument that Breininger's complaint did not state a claim, even though that contention had never been reached below.[181] The Court based its holding—that the DFR attaches to the operation of a non-exclusive hiring hall—on the effect of the union's status as exclusive representative and on the union's ability to operate the hiring hall. The Court's analysis has some facial appeal because even where the hiring hall is non-exclusive, many employers may choose to rely on it as their primary source of employees due to their collective bargaining relationships with the union. There are many areas, however, where the union's status as exclusive representative and its collective bargaining agreements facilitate its nonrepresentational functions. The breadth of *Breininger*'s analysis raises a substantial possibility that these activities will be subject to the DFR.

For example, a union's status as exclusive bargaining representative and a union security provision in its collective bargaining agreement greatly enhance the union's ability to recruit full book members from the employer's employees. Many employees would not be union members but for the union's status and the contract. Nevertheless, the union does not act as exclusive representative in providing membership benefits or in enforcing union disciplinary

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[179] *Id.* at 21–22.

[180] Amicus Brief for National Labor Relations Board in Support of Granting Certiorari at 9–11; Amicus Brief for U.S. Government in Support of Petitioner at 13–15.

[181] 493 U.S. at 86. The union, in a major tactical blunder, devoted a considerable portion of its brief to attacking the NLRB's substantive rulings under § 8(b)(2) regarding union hiring hall operations. Brief for Respondent at 9–26. The Court should have dismissed this argument as irrelevant to the jurisdictional issue presented. Instead, the Court dismissed the argument as irrelevant on the ground that the DFR is broader than § 8(b) regulation of the same activity.

rules, and lower courts have unanimously held that such union activities are not subject to the DFR.[182] The *Breininger* analysis questions the validity of these decisions.

Just as *Howard* has been largely ignored outside the context of racial discrimination,[183] *Breininger* and *Beck* eventually may be regarded as cases limited to hiring hall referral and union security fee disputes. They may also signify a new result orientation in Supreme Court DFR jurisprudence, where the Court uses the DFR to bypass exclusive NLRB jurisdiction over sections 8(b)(1)(A) and 8(b)(2) unfair labor practice charges.

An area that may now be subject to DFR attack, superseniority for union officials, illustrates the folly of using the DFR to circumvent NLRB jurisdiction. Unions frequently negotiate provisions in their collective bargaining agreements providing superseniority to various union officials. The NLRB, interpreting section 8(b)(2), has resolved the legality of superseniority clauses by balancing the union's justification against the clause's discriminatory effects. The Board has consistently upheld superseniority protection against layoffs for shop stewards whose representational functions are performed on the job. It has reached varying results concerning superseniority for other purposes and other union officers.[184] Courts reviewing NLRB decisions in this area generally have confined their role to determining whether the Board's interpretation is reasonable, rather than whether the court would decide the issue the same way in the first instance.[185]

If an employee brings a DFR action challenging the superseniority clause of a collective bargaining agreement, the court will have to choose between two conflicting lines of DFR case law. Under *O'Neill*, the union's conduct in negotiating the superseniority clause will breach its DFR only if, in light of the state of the law prevailing at the time of negotiation, its actions are irrational.

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[182] *See, e.g.*, American Fed'n of Gov't Employees Local 916 v. Federal Labor Relations Authority, 812 F.2d 1326 (10th Cir. 1987); National Treasury Employees Union v. Federal Labor Relations Authority, 800 F.2d 1165 (D.C. Cir. 1986); Hovan v. United Bhd. of Carpenters, 704 F.2d 641 (1st Cir. 1983); Bass v. International Bhd. of Boilermakers, 630 F.2d 1058 (5th Cir. 1980); Ft. Bragg Ass'n of Educ., 28 F.L.R.A. 908 (1987).

[183] *But see supra* notes 144–155 and accompanying text discussing *Howard*'s effects on the DFR toward retirees.

[184] *See generally* THE DEVELOPING LABOR LAW 245–46 (2d ed. Charles J. Morris, et al., eds. 1983 and 5th Supp. 132–34 (1989)).

[185] *See* Local 900, Int'l Union of Elec., Radio & Machine Workers v. National Labor Relations Board, 727 F.2d 1184 (D.C. Cir. 1984).

Under *Breininger*, however, the union's DFR will be increased if the employer provides little or no check against the union's conduct. An employer has minimal incentive to oppose the superseniority clause, because it costs the employer little or nothing. On the other hand, superseniority is very valuable to the union. Consequently, the employer is likely to extract from the union the maximum concessions that it is able to obtain for the clause. Under *Beck*, the union may face a strict liability DFR standard. Moreover, under *Breininger*, the DFR standard is not limited by the NLRB's interpretation of section 8(b)(2). Thus, the *Beck-Breininger* DFR jurisprudence may effectively render irrelevant section 8(b)(2) and the NLRB's expert judgments concerning superseniority clauses irrelevant.

Regardless of how broadly *Beck* and *Breininger* eventually are interpreted, they are sure to add to the confusion in lower court DFR jurisprudence. This confusion will aggravate the problems caused by the Supreme Court's refusal to address the most common DFR issue: the level of culpability necessary for a DFR breach in grievance handling. It is to this issue that I now turn.

IV. The DFR and Grievance Administration

Beck and *Breininger* should have no application to grievance administration. The employer generally plays no role in the union's expenditure of union security fees and in its day-to-day management of the hiring hall. Consequently, the union's actions are unchecked by an employer's conflicting interests. In *Breininger*, the presence of unchecked union power increases the level of duty the union owes to the employees it represents. In grievance administration, the union seeks to gain something that the employer resists giving. A true conflict of interest exists, serving as a check on the unbridled exercise of union power. Thus, the higher duty in *Beck* and *Breininger* does not apply, and the DFR law of grievance handling remains as confused as it was after the Court decided *Vaca*.[186]

The duty of fair representation is the sole external means by which employees may hold their union accountable for its actions

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[186] *O'Neill* does clarify the law somewhat. It rejects the requirement of intentional union misconduct for a DFR breach. *O'Neill*, however, says nothing concerning what objective standard of care should govern DFR grievance handling cases.

in representing them.[187] In *O'Neill* the Court adopted a level of accountability for contract negotiation that is highly deferential to union discretion due to the laissez-faire policy toward the substantive outcome of the bargaining process. In shaping the level of accountability in grievance handling, it is necessary to consider federal policy toward the grievance procedure.

Federal policy strongly favors grievance arbitration. Underlying this policy are two views of the nature of the grievance procedure. Under one view, the grievance procedure exists as a means to enforce contractual rights that the union secured for the employees in collective bargaining. This view finds support in *Smith v. Evening News Association*,[188] where the Supreme Court held that section 301 of the Labor Management Relations Act vests federal district courts with jurisdiction over actions by employees against their employers for breach of collective bargaining agreements. Although individuals could sue to vindicate their contractual rights, the grievance and arbitration procedure, in which the union serves as advocate for the individual grievant, provides a cheaper, faster substitute for resolving their claims.

The second view regards the grievance procedure as a continuation of the collective bargaining process, during which the union may clarify or even amend the contract. Under this view, supported in the *Steelworkers Trilogy*,[189] the grievance procedure is an instrument of industrial self-government. The union continues to represent the collective interests of the bargaining unit.

In *Vaca*, the Court recognized both views as limiting the level of union accountability in grievance handling. In refusing to hold

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[187] The Supreme Court recognizes the DFR as an instrument of union accountability, frequently characterizing the duty as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Breininger*, 493 U.S. at 87; DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 165 n.14 (1983); Bowen v. United States Postal Service, 459 U.S. 212, 240 (1983) (White, J., concurring in part and dissenting in part); International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 47 (1979); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 n.15 (1977); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564 (1976); National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967); Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[188] 371 U.S. 195 (1962). In *Smith*, 49 unionized employees alleged that the company violated their collective bargaining agreement's prohibition against anti-union discrimination when it refused to allow them to work during a strike by another union, even though it allowed non-unionized employees to work.

[189] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

the union strictly liable for failing to arbitrate a grievance that a court later determined to be meritorious, the *Vaca* Court sought to preserve grievance arbitration as an efficient litigation substitute by protecting it from being flooded with an unmanageable number of claims.[190] The Court also sought to protect the grievance process as an instrument of self-government by leaving unions and employers free to settle similar claims in a consistent manner, and to isolate major problem areas and try to resolve them through negotiation.[191] In this section, like the Court in *Vaca*, I consider both functions of the grievance procedure. I argue that depending on the nature of the grievance, either function may predominate. I suggest that the DFR standard of care should turn on which function predominates.

In the Supreme Court, Justice Black was the strongest adherent to the view that the grievance procedure is a litigation substitute that exists to protect contractual rights. In his view, collective bargaining is the process of creating contractual rights that flow to individual employees, while contract administration is the process of vindicating those rights where there has been a breach.[192]

Several lower courts and commentators agree with Justice Black's distinction between contract negotiation and grievance administration. They argue that the collective bargaining agreement creates contractual rights that employees rely on the union to enforce.[193] Under *Smith*, employees could enforce their contractual rights in court, but the collective bargaining agreement defeats this right by giving the union exclusive control over the claim. Thus, because the contract has deprived individual employees of their right to sue, "[t]he union . . . has a special obligation to act on [their] behalf."[194]

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[190] 386 U.S. 171, 191 (1967).

[191] *Id.* at 191–92.

[192] *Id.* at 205–07 (Black, J., dissenting); Republic Steel Corp. v. Maddox, 379 U.S. 650, 659 (1965) (Black, J., dissenting).

[193] *See, e.g.*, Thomas v. United Parcel Service, 890 F.2d 909, 917–19 (7th Cir. 1989); Parker v. Connors Steel Co., 855 F.2d 1510, 1519–20 (11th Cir. 1988); Alfred W. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1467–68, 1475–76 (1961); Fredric C. Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L. FORUM 35, 44, 64; Clyde W. Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251, 254 (1977).

[194] Summers, *supra* note 193, at 256.

Those who argue for a stricter DFR standard in contract administration observe that grievance handling requires less flexibility for the exercise of discretion than does contract negotiation.[195] They analogize the union's role in contract negotiation to that of a legislature, and its role in contract administration to that of an administrative agency.[196] They also view the union as an agent of the individual employee who owes that employee a fiduciary obligation in handling his or her grievance.[197]

The concept of the union as enforcer of contractual rights in the grievance process has much intuitive appeal. Employees rely on the collective bargaining agreement, particularly for job security. Moreover, a majority of DFR grievance handling cases involve discipline and discharge grievances.[198] The typical collective bargaining agreement's prohibition on discipline or discharge without cause[199] is a paradigm example of a collectively bargained restraint on management authority that appears to have created an individual contract right.

The contract enforcement view of the grievance process, however, neglects the role of the grievance procedure as a continuation of the collective bargaining process.[200] The grievance procedure provides a formal mechanism for union-employer negotiations during the term of the contract. If negotiations are unable to resolve the issue, the parties agree to submit the dispute to arbitration and to be bound by the arbitrator's decision, rather than to resort to economic weapons. Three examples illustrate how the contractual rights enforcement view of the union's role in grievance handling can impede the collective bargaining process.

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[195] Blumrosen, *supra* note 193, at 1476; Leffler, *supra* note 193, at 63–64; Summers, *supra* note 193, at 257.

[196] Those who favor this analogy do not necessarily agree on the standard that should be used to evaluate the union's conduct in grievance handling. *Compare* Summers, *supra* note 193, *with* Lea S. VanderVelde, *A Fair Process Model For the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983).

[197] Summers, *supra* note 193, at 257.

[198] Goldberg, *supra* note 5, at 134 (56.6% of published court opinions and 58.0% of courthouse files examined involved claims of discharge without cause; 2.0% of published opinions and 2.7% of courthouse files involved discipline short of discharge).

[199] A Bureau of National Affairs survey shows that 97% of all collective bargaining agreements expressly control discipline and discharge, and 94% expressly require just cause. BASIC PATTERNS IN UNION CONTRACTS 7 (12th ed. 1990).

[200] *See generally* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Charles Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. _____ (forthcoming 1991); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Arthur J. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. 13 (1965).

Smith v. Hussman Refrigerator Co.,[201] provides the first example. Here, the collective bargaining agreement contained a modified seniority provision for promotions, whereby seniority was to govern among applicants of relatively equal skills and abilities for promotion. The company awarded four openings to four junior employees and senior employees grieved. The union, following its policy of always supporting the most senior employees who bid for promotions, grieved the company's action, and an arbitrator sustained the grievances with respect to two vacancies. A majority of the Eighth Circuit Court of Appeals held that the junior employees who were awarded the promotions had contractual rights based on management's evaluation of their qualifications, and that the union owed them a duty of fair representation.[202] A plurality held that the union breached its duty by automatically processing the grievances on the basis of seniority alone without considering the junior employees' claims to the positions based on qualifications and selection by management.[203]

The plurality's analysis follows logically from the contractual rights distinction between contract negotiation and grievance handling. Junior employees would have had no basis for complaint if the union had negotiated a contractual provision requiring that promotions be granted according to seniority. Seniority is a relevant factor and basing decisions on seniority falls within the union's wide range of reasonableness. Once the union agreed to a modified seniority provision, however, the contract gave junior job bidders a right, or at least a specific expectation, that they would receive the position if they were substantially better qualified than their senior co-workers. Thus, by adhering to a policy of always supporting the most senior employees, the union ignored the contractual rights of the junior employees selected by management. The union could only fulfill its duty of fair representation by evaluating the competing contractual claims of the junior and senior employees on their merits before deciding which group to support.

Consideration of the negotiations that produced agreement on the modified seniority clause exposes the flaw in the contractual

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[201] 619 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 839 (1980).

[202] 619 F.2d at 1238 (plurality opinion); *id.* at 1246 (opinion of Bright and Ross, J.J.).

[203] *Id.* at 1239. Judges Bright and Ross dissented from the finding of a breach because they believed that the junior employees' interests were adequately represented by management. *Id.* at 1246.

rights analysis. The union probably initially demanded that promotions be governed strictly by seniority or that seniority govern among all bidders meeting the minimum qualifications for the position. The company probably demanded that it have the right to unreviewable discretion in filling vacancies or that promotions be governed strictly by merit. The modified seniority clause is a common compromise.[204] When the parties agree to this compromise, they understand that they do not agree on its meaning. The company recognizes that the union will emphasize the word "relatively" and the union realizes that the company will emphasize the word "equal" in deciding whether competing employees' qualifications are "relatively equal" so that seniority will govern the promotion. Both parties recognize that the union will seek to limit and the company will seek to expand, as much as possible, the company's ability to select a junior employee.

The modified seniority clause does not represent the conferral of specific contractual rights, or even expectations. Rather, it represents a company-union decision to defer resolution of their differences over the relative roles of qualifications and seniority to case-by-case negotiations through the grievance procedure, and to substitute arbitration for strikes and lockouts as the method of resolving impasses in those negotiations. In processing seniority grievances, the union is continuing the collective bargaining process, and its pursuit of strict seniority to govern promotions is no more a DFR breach than it would be in contract negotiations.

Gregg v. Teamsters Local 150[205] is a second example of the flaws in the contractual rights view of grievance handling. Here, the collective bargaining agreement provided for severance pay for employees terminated "due to the closing of a plant or depot and the discontinuance of its operations," but denied severance pay to employees laid off by operation of seniority.[206] The company closed three of its four depots in the Sacramento, California area and substantially reduced operations at the fourth. The union filed grievances seeking severance pay for all employees who had lost their jobs. The company denied the grievances, arguing that be-

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[204] The Bureau of National Affairs estimates that 25% of all collective bargaining agreements contain such modified seniority clauses governing promotions. BASIC PATTERNS IN UNION CONTRACTS 88 (12th ed. 1990).

[205] 699 F.2d 1015 (9th Cir. 1983).

[206] *Id.* at 1015–16.

cause the four depots had a common seniority list that was used to effectuate the reduction in force, the company's actions constituted a layoff by seniority and no severance pay was due. On the morning of the arbitration, the union withdrew the claims of employees who had worked at the depot that was not closed, because it believed that those claims would weaken the claims of other employees. An arbitrator sustained the other grievances and awarded severance pay to the employees who had worked at the three closed depots.

The Ninth Circuit held that the union breached its DFR to the employees who had worked at the fourth depot. The court reasoned that the employees from the fourth depot had reasonable arguments and that there was no reason to believe that the arbitrator could not have sorted out the different claims. The court concluded that the union's reasons for withdrawing the grievance were too insubstantial to fulfill its DFR.[207]

If grievance arbitration were nothing more than a substitute for adjudication of distinct contract claims, the court's holding that the union should have put forth all reasonably supportable claims and relied on the arbitrator to sort them out would be defensible. Arbitration, however, is a continuation of the collective bargaining process. The arbitrator interprets the contract, but in the context of the parties' continuing collective bargaining relationship. Had the union continued to press for severance pay for employees from the facility that was not closed, the arbitrator would not have faced two separate breaches of contract claims. Rather, the company would have grouped the claims together, arguing to the arbitrator that even the union considered the severance pay provisions to apply to the Sacramento operations as a whole. The company would have argued further that because it continued to operate in Sacramento, the only job security protection called for in the entire reduction-in-force (RIF) was layoff by seniority. Similarly, by dropping the grievance from the facility that remained open, the union was able to argue that the only employees for whom it was seeking severance pay came from the depots that were closed, and that the company was trying to avoid severance

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[207] *Id.* at 1016. The court also buttressed its conclusion by observing that the union decided to withdraw the grievance in one day, without considering each grievant's facts individually. *Id.*

pay that was called for by basing the RIF on seniority. Just as a union may drop reasonably based demands at the bargaining table in order to take only its strongest positions into a strike or lockout, it should be free to drop reasonably based demands in grievance processing in order to take only its strongest positions into arbitration.

Professor Clyde Summers' "Case of the Paper Promise"[208] provides the third example. Professor Summers hypothesizes a situation where a company pays less than the contractually specified wage rate, overtime rate and vacation pay because of its inability to pay and the union decides not to pursue the employees' grievances. Professor Summers maintains that this is a disguised wage concession. The proper approach for the union is to amend the contract prospectively and subject the amendment to the appropriate contract ratification procedures.

Professor Summers' argument is strengthened by *Smith v. Evening News*.[209] Were it not for the exclusive grievance and arbitration procedures of the contract, under *Smith* the employees could sue for the wage underpayments. Nevertheless, when the parties adopt a grievance and arbitration system, they reject the notion that the collective bargaining agreement is merely a conferral of specific contractual rights. Instead, they provide for an ongoing system of collective bargaining that is more flexible than the provision of specific contractual rights.

A union may find that nonenforcement of the wage provisions is more advantageous than agreement to formal wage concessions. The union is able to cease its nonenforcement at any time, but is locked in for the duration of the formal wage concessionary agreement regardless of changes in the company's finances.[210] The union

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[203] Summers, *supra* note 193, at 263–66. For an actual case similar to Professor Summers' hypothetical, see Walker v. Consolidated Freightways, Inc., 930 F.2d 376 (4th Cir. 1991).

[209] 371 U.S. 196 (1982).

[210] It is possible to craft a formal agreement linking concessions to the company's economic performance. Such an agreement, however, would not be likely to cover every potential change in the company's fortunes. Moreover, a union claim that a change in conditions required abandoning the concessions would likely be met by a contrary company position, resulting in the matter being submitted to arbitration with the union bearing the burden of proof. On the other hand, without a formal agreement, if the union believes that conditions have changed or are not likely to change and therefore that it is no longer worthwhile to refrain from enforcing the wage provisions, the union need only give the company notice of its intent to enforce the contract and then move to do so. The union's

may also decide that a temporary period of nonenforcement will preserve an amicable collective bargaining relationship, particularly where there have been past instances of company concessions to the union and the employees that were not strictly required by the contract.

Nevertheless, it may be argued that the union has amended the contract effectively and avoided its obligation to submit the amendment for rank-and-file ratification. A number of courts have held that a union whose constitution requires contract ratification breaches its DFR by failing to submit the contract for ratification or by acting improperly in the ratification proceeding.[211] These decisions are erroneous. Nothing in the union's status as exclusive bargaining representative nor in any other provision of the NLRA or RLA imposes an obligation to submit contracts for rank-and-file ratification.[212] The union's constitution and by-laws create and define the boundaries of the union membership's ratification rights. The union, if it has a duty to submit a contract to ratification, owes it to the union's members and not to employees who are members of the bargaining unit. Although these two groups may overlap, usually they will not be identical. If the union's nonenforcement of a particular provision of the collective bargaining agreement breaches its obligation to submit contract amendments for ratification, the union is liable for breach of its constitution and for violating Title I of the LMRDA, but not for breach of its DFR.[213] This distinction is very important. If the union's liability is limited to breach of its constitution and of the LMRDA, nonmembers may not sue even though the union represents them, and the employer may not be sued for breach of the collective bargaining agreement.

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prior acquiescence in the company's underpayments will not bind it once it gives the company notice of its intent to enforce. *See generally* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 399–400 (4th ed. 1985).

[211] *See, e.g.*, Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988); Alexander v. Operating Engineers, 624 F.2d 1235 (5th Cir. 1980); Teamsters Local 310 v. National Labor Relations Board, 587 F.2d 1176 (D.C. Cir. 1978); Deboles v. Trans World Airlines, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); Goclowski v. Penn Central Transportation Co., 571 F.2d 747 (3d Cir. 1977); Trail v. Teamsters, 542 F.2d 961 (6th Cir. 1976); Frenza v. Sheet Metal Workers, 567 F. Supp. 580 (E.D. Mich. 1983); *but see* Maurer v. Auto Workers, 105 L.R.R.M. (BNA) 2883 (M.D. Pa. 1980) (failure to allow some employees to vote on contract ratification not an actionable DFR breach where their votes could not have changed the result).

[212] *See* Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).

[213] *See* Brown v. International Bhd. of Elec. Workers Local 58, 137 L.R.R.M. (BNA) 2747 (6th Cir. 1991).

In summary, when a union's actions in grievance handling are essentially a continuation of its role in collective bargaining, the DFR should be judged according to the same standard that is used in contract negotiations. Under *O'Neill* the union still must explain its conduct, and the explanation must not be irrational. The plaintiff may attack the credibility of the explanation and if the court finds it not to be rational, the union's unexplained conduct will breach the DFR. Imposing any stricter standard on the union would distort the collective bargaining process.

The above considerations underlie the concurring opinion of Justices Goldberg and Brennan in *Humphrey v. Moore*.[214] Believing that "[t]here are too many unforeseeable contingencies in a collective bargaining relationship to justify making the words of the contract the exclusive source of rights and duties,"[215] Justices Goldberg and Brennan argued that it was irrelevant whether the joint grievance committee's decision to dovetail seniority lists was a reasonable interpretation of the contract. In their view, the union and employer may use the grievance procedure to resolve the particular dispute before them by interpreting, applying or amending the contract. Any other result, in their view, is inconsistent with cases such as the *Steelworkers Trilogy*, which hold that the grievance procedure is a part of the overall collective bargaining process.

Several courts and commentators have agreed with this analysis. They have argued that imposing a stricter standard on the union in grievance handling than in contract negotiation would undermine the grievance system's role in the collective bargaining process,[216] would facilitate union-employee collusion to revive otherwise dead grievances,[217] would undermine federal labor policy favoring grievance arbitration[218] and would impose artificial norms on union allocations of resources.[219]

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[214] 375 U.S. 335, 351, 358 (1963) (Goldberg, J., concurring).

[215] *Id.* at 353.

[216] Camacho v. Ritz-Carlton Water Tower Place, 786 F.2d 242, 244 (7th Cir. 1986), *cert. denied*, 477 U.S. 908 (1986); Graff v. Elgin, Joliet & E. Ry., 697 F.2d 771, 780–81 (7th Cir. 1983); Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211, 1260–62 (1990).

[217] Hoffman v. Lonza, 658 F.2d 519, 522 (7th Cir. 1981); *Camacho*, 786 F.2d at 244.

[218] *Camacho*, 786 F.2d at 244; *Graff*, 697 F.2d at 780.

[219] *Camacho*, 786 F.2d at 245; *see* Harper & Lupu, *supra* note 216, at 1276; James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 CHI.-KENT L. REV. 255 (1987); Richard Brook, *Punitive Damages Under Section 301 After Foust: Economic Considerations*, 24 COLUM. J.L. & SOC. PROBS. 1, 34–35 (1990) (interpreting Court's

Although the grievance and arbitration process is part of the overall collective bargaining process, the individual employee still has a substantial legal interest in the process. The presence of a collective bargaining agreement does not come without cost to the individual's legal rights. In the absence of a collective bargaining agreement, individuals' concerted activity to protest workplace grievances is protected under section 7 of the NLRA. That activity loses its protection when it bypasses the contractually established grievance procedure.[220] The collective bargaining agreement will preempt an individual's state tort claim if resolution of that claim turns on contract interpretation.[221] Although a state tort claim for retaliatory discharge is not preempted,[222] some jurisdictions, as a matter of state tort law, do not afford or restrict the cause of action for employees covered by collectively bargained just cause provisions.[223] Some statutes, such as the Montana Wrongful Discharge Act,[224] exclude employees covered by collective bargaining agreements from their protection. Although protection under federal employment statutes is independent of the collectively bargained grievance procedure,[225] an arbitration award is evidence in the statutory proceeding and, as a practical matter, an unfavorable award is extremely prejudicial to the employee's chances of succeeding on the statutory claim.[226]

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decision in International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) as expressing concern that imposing punitive damages for DFR breaches would cause unions to inefficiently over-invest resources in grievance handling).

[220] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

[221] *See, e.g.*, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985); Schlacter-Jones v. General Telephone, 936 F.2d 435 (9th Cir. 1991); McCormick v. A.T.& T. Technologies, Inc., 137 L.R.R.M. (BNA) 2453 (4th Cir. 1991). For criticism of this approach, see Michael Harper, *Three Cheers for the Trilogy but Only One for Lingle and Lueck*, 66 CHI.-KENT L. REV. _____ (forthcoming 1991).

[222] Lingle v. Norge Div., Magic Chef, Inc., 486 U.S. 399, 407 (1988).

[223] *See, e.g.*, Ewing v. Koppers Co., 537 A.2d 1173 (Md. 1988); Payne v. Pennzoil Corp., 672 P.2d 1322 (Ariz. 1983); Embry v. Pacific Stationery & Printing Co., 659 P.2d 436 (Or. 1983); *see also* MASS. GEN. LAWS ANN. ch. 152, § 75B(3) (1988) (collective bargaining agreement prevails if its provisions conflict with Massachusetts Workers Compensation Act antiretaliation provision).

[224] MONT. CODE ANN. § 39-2-912(2) (1989).

[225] *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284 (1986); Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Alexander v. Gardner-Denver Corp., 415 U.S. 36 (1974).

[226] A survey by Professors Lamont Stallworth and Michelle Hoyman found that of 1761 arbitration awards involving issues related to Title VII of the 1964 Civil Rights Act, grievants litigated their Title VII claims in court in 307 cases, but obtained a result different from the arbitration award in only 21 cases. Thus, a grievant who lost a discrimination claim in

Recognition of the role that the grievance procedure plays in the overall collective bargaining process does not justify a wholesale rule that the union's DFR in grievance handling is the same as in contract negotiation. In many cases, the union is acting primarily as the individual's advocate and not negotiating for the bargaining unit as a whole. Union mishandling of grievances greatly prejudices the individuals' interests without any compensating benefit to the collective bargaining process.[227]

In such cases the DFR's role as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law"[228] calls for a stricter level of union accountability than in contract negotiation. Nevertheless, considerations of federal labor policy limit the level of accountability. For example, as interpreted in *Humphrey* and *Vaca*, policies toward grievance arbitration require a showing of union culpability for a DFR breach. To determine the level of culpability that the DFR encompasses, it is necessary to examine federal labor policy further.

There is a strong federal labor policy in support of finality in the grievance process.[229] A strict level of union accountability conflicts with this policy to the extent that it may lead to collusive revivals of dead grievances. The concern over union-employee collusion to revive dead grievances, however, is speculative at best. A DFR charge attacks the union's competence and integrity in representing employees. Rather than rolling over and playing

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arbitration had only a slightly better than one in 100 chance of prevailing in litigation. Lamont Stallworth et al., *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49, 55 (1984). *See* Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (arbitration award finding just cause for discharge fulfills defendant's burden of articulating a legitimate reason for Title VII plaintiff's discharge, thereby triggering plaintiff's burden of proving pretext). *But see* Perry v. Larson, 794 F.2d 279, 284 (7th Cir. 1986) (upholding exclusion of arbitration award from evidence in action under 42 U.S.C. § 1983 because arbitrator did not consider the First Amendment issue raised in the § 1983 action).

[227] Professor David Feller, one of the leading academic supporters of the view that a collective bargaining agreement creates no individual contract rights, nevertheless, recognizes the individual's interests when he or she relies on the union as advocate in the grievance procedure and argues for holding the union accountable when its unreasonable conduct prevents the grievance from going to arbitration. David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 774–92, 805–12 (1973).

[228] Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 87 (1989); *see also supra* note 187.

[229] *See, e.g.*, United Paperworkers Int'l Union v. Misco Corp., 484 U.S. 29 (1987).

dead just to revive the underlying grievance,[230] it is far more likely that a union will react defensively to a DFR charge.[231]

There is a strong federal policy against undue interference with internal union affairs[232] with which a strict level of union accountability may conflict to the extent that it imposes resource allocations on unions. The concern over resource allocation is well founded. The stricter the level of accountability in grievance handling to which unions are held, the more resources they will devote to competent grievance handling. Because a union's resources are limited, this will necessarily affect union resource allocation decisions. A union will not be able to save money for a strike fund by spending nothing on competent grievance investigation.

The same allocational effects result from all aspects of the DFR. For example, under *Conley v. Gibson*,[233] a union may not save money for its strike fund by refusing to process the grievances of minority employees. The issue is not whether to avoid influencing union allocations of resources among its representational functions, but rather whether the intrusion into such allocational decisions is justified. The substantial individual interest in grievances where the union is serving primarily as the individual's advocate justifies the effects on the union's allocational decisions.

The effects of a strict level of accountability on the federal policy favoring the resolution of grievances through arbitration present the strongest argument for limiting the DFR in grievance handling. A finding of a DFR breach frees the employee plaintiff from the exclusivity of the grievance-arbitration procedure and enables her to pursue her breach of contract claim against the employer in court. The stricter the level of union accountability in

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[230] The U.A.W. has an internal procedure that allows members to allege DFR breaches and has negotiated into many of its collective bargaining agreements provisions reviving grievances if the internal procedure finds a DFR breach. The U.A.W. instituted the procedure in 1957. If union-employee collusion were a problem, one would expect to see the internal procedure used frequently to revive dead grievances. On the contrary, as of 1980, after over twenty years, the internal procedure had produced only one finding of a DFR breach. Arthur L. Fox & Robert B. Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989, 1008–09 n.75 (1980).

[231] Ruzicka's lawyer reports that by the time Ruzicka's DFR lawsuit went to trial, his friends in the local union had abandoned him. Robert Dinges, Ruzicka v. General Motors: *An Unlikely Hero of the Trade Union Movement—The Individual Employee in a Section 301 Case Who Has Been a Victim of Union Negligence*, 24 WAYNE L. REV. 1773, 1776 (1978).

[232] *See, e.g.*, United Steelworkers v. Sadlowski, 457 U.S. 102 (1982); National Labor Relations Board v. Boeing Co., 412 U.S. 67 (1973).

[233] 355 U.S. 41 (1957).

grievance handling, the greater the incidence of courts, rather than arbitrators, resolving grievances.

Vaca suggested two approaches to an employee's grievance after finding a DFR breach in grievance handling: remand to the grievance procedure or judicial resolution of the breach of contract claim. Subsequent cases, however, have virtually ignored the first alternative.[234] Today, if a court finds a DFR breach, the underlying breach of contract claim will be heard by a jury if the plaintiff demanded a jury trial,[235] and there will be a judicial apportionment of back pay damages between employer and union.[236] The employer, no matter how blameless, cannot rely on the grievance procedure to avoid judicial determination of the grievance, even if the employer already has succeeded in arbitration.[237]

The typical DFR case arising out of a union's handling of a discharge grievance illustrates the potential for undermining labor policy regarding grievance arbitration. When an employer agrees that it will only discharge for just cause, it does so recognizing that just cause in any particular case will ultimately be defined by an arbitrator. The parties have agreed that just cause means whatever the arbitrator interprets it to mean. The essence of the parties' agreement is that the union will refrain from striking to force reinstatement and the employer will abide by the arbitrator's award.[238] Consequently, there is a heavy presumption that grievances are arbitrable, and an arbitrator's award will be enforced as long as "it derives its essence" from the collective bargaining agreement.[239]

When, because of a DFR breach, a judge or a jury defines just cause, the parties are held to a bargain markedly different from the one to which they originally agreed. Courts should be reluctant to change the basis of the parties' bargain. Under the current state of the law, limiting the DFR's level of accountability also limits judicial rewriting of the parties' bargain.

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[234] The one exception is Clayton v. United Auto Workers, 451 U.S. 679 (1981), which held that a DFR plaintiff may be required to exhaust internal union remedies if those remedies can revive the grievance.

[235] Chauffers, Local 391 v. Terry, 494 U.S. 558 (1990).

[236] Bowen v. U.S. Postal Service, 459 U.S. 212 (1983).

[237] Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

[238] *See* Feller, *supra* note 227, at 792, 778–82.

[239] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 597, 597 (1960), *quoted in* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987).

Thus, there are strong policy reasons against allowing the union's incompetent performance of its advocacy function in grievance handling to transform the collective bargaining agreement into a judicially enforceable collection of contract rights. These policies, however, should not strip the individual of protection from an incompetent representative. It is not the federal policy favoring grievance arbitration that per se limits the DFR in grievance handling; it is the effects of a DFR breach under current law on adjudication of the merits of the grievance that creates the need to limit the DFR. Eliminate these effects and there is no reason not to hold the union accountable when it acts incompetently in its role as advocate for the individual grievant.

Thus, there should be a revival of *Vaca's* forgotten alternative: remand the grievance to the grievance procedure. There may be good reason for judicial resolution of the merits of the grievance if the union has acted maliciously toward the grievant. A court order cannot ensure that the union will set aside its enmity and properly represent the grievant. Where the union has acted incompetently but in good faith, however, there is no substantial reason to believe that remand to arbitration will be futile. Moreover, remand to arbitration allows protection of individual interests without distorting the basic bargain of the parties by intruding on the arbitrator's role in contract interpretation.[240]

Remanding the grievance to the grievance procedure does undermine the finality of that process. Litigating the grievance in court, however, undermines grievance procedure finality and undermines the very essence of the grievance procedure by substituting judicial interpretation and application of the contract for arbitral resolution of the grievance. Remand to the grievance procedure also has the advantage of avoiding judicial apportionment of damages between union and employer. In *Bowen v. United States Postal Service*,[241] the Supreme Court held that the back pay liability of an employer who wrongfully discharges an employee

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[240] Others have argued that remand to arbitration should be the primary remedy in DFR cases but have not linked the remedy to the issue of DFR standard of care. Stuart Bernstein, *Breach of the Duty of Fair Representation: The Appropriate Remedy*, 33 NAT'L ACAD. ARB. PROC. 88 (1981); Harry T. Edwards, *The Duty of Fair Representation: A View From the Bench*, *in* THE CHANGING LAW OF FAIR REPRESENTATION 93 (Jean T. McKelvey ed., 1985). Professor Feller links the DFR remedy to the DFR standard of care, but refuses to allow incompetent representation to disturb an otherwise final arbitration award. Feller, *supra* note 227, at 805–12.

[241] 459 U.S. 212 (1983).

stops running on the date the employee would have been reinstated had the union not breached its duty of fair representation. From that point forward back pay liability falls on the union. The court reasoned that this result would enable the employer to rely on the union's actions in the grievance procedure as having settled the matter with some degree of finality.

Bowen's apportionment of damages may work to the long term detriment of some employers. The fear of potential back pay liability may cause some unions to arbitrate grievances that they otherwise would have settled or withdrawn, thereby imposing additional costs on the employers.[242] Remand to the grievance procedure leaves resolution of the damage apportionment issue to the parties in the first instance, enabling them to decide what approach best fits their interests. If the parties are unable to agree, the issue will be submitted to arbitration.

The arbitrators, however, may not have authority to award damages against the union. The issue presented in arbitration will be whether the union's DFR breach prejudiced the employer in such a way as to mitigate its back pay liability. An arbitrator who finds grounds for mitigation will reduce the back pay award accordingly. To make the grievant whole, the court will have to enter a judgment against the union for the remaining back pay. Consequently, when a court in a DFR case remands a grievance, it should retain jurisdiction to enable the grievant, if necessary, to return to court to secure monetary relief against the union.

To summarize, in the absence of bad faith or discriminatory animus, a union's DFR in grievance handling may be resolved by a two-part inquiry. First, in the grievance at issue, was the union acting primarily as collective bargaining representative of the unit as a whole or as advocate for the individual grievant?[243] If the

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[242] Commentators have criticized the decision on this basis. *See* Paul Lansing, Bowen v. United States Postal Service: *The Duty of Fair Representation Becomes a Burden*, 2 HOFSTRA LAB. L.J. 122, 151 (1984); Richard Lipsitz, *New Substantive and Procedural Areas*, *in* THE CHANGING LAW OF FAIR REPRESENTATION 47, 52 (Jean T. McKelvey ed., 1985).

[243] I do not intend to suggest that this inquiry will always be easy. Many grievances contain elements of both and the court will have to exercise care in determining which element predominates. Even in cases where the union is acting primarily as individual employee advocate, the court should, to the extent possible, differentiate between those aspects of the union's conduct that were advocacy and those that may be attributed to service as bargaining representative for the unit as a whole. For example, assume a union has determined that an individual's grievance has only a 10% chance of success and has decided not to press the grievance to arbitration because it believes that taking such a weak

former, the union's conduct should be evaluated under the irrationality standard of *O'Neill*. If the latter, the union should be required to exercise reasonable care, taking into account all of the surrounding circumstances. This does not mean that union representatives should be held to a lawyer's malpractice standard. A union business representative who is a full-time labor relations professional but lacks formal legal training should be held to a standard of a reasonable business representative. A shop steward who is a full-time bargaining unit employee should be held to the standard of a reasonable shop steward.[244]

Imposing a standard of reasonable care based on the position of the individual handling the grievance will not unduly interfere with the union's resource allocation decisions. Rather, it will effectuate the resource allocation decisions that the union has impliedly made to the employees.

For example, when a union chooses to rely on shop stewards at the initial stages of the grievance procedure, it is communicating a decision not to spend money to use full-time professionals. By designating certain rank-and-file employees as shop stewards with special functions in the grievance process, it also is representing that these individuals are more skilled in the grievance process and the contract in general than their coworkers. Although the union has decided not to spend a large sum of money on grievance arbitration, it has chosen to spend more than it would if it left the employees completely on their own. Holding the stewards to a minimal standard of competence in writing and filing grievances, and expecting them to recognize when a problem is beyond their expertise, effectuates the resource allocation decisions implied in the union's choice to provide stewards to represent the employees.

Similarly, when a union decides to use business representatives or other non-lawyer professionals to process grievances and present arbitrations, it has made a resource allocation decision to spend sufficient funds to develop a cadre of professionals who,

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grievance will, in the long term, damage its good relationship with the employer. The union's policy not to arbitrate such weak grievances should be evaluated under the irrationality standard of *O'Neill*, but its assessment of the strength of the particular grievance in issue should be evaluated under the reasonable care standard.

[244] Judge Posner's concern, expressed in Graff v. Elgin, Joliet & E. Ry., 697 F.2d 771 (7th Cir. 1983), that courts are incapable of developing such standards, is a case of uncharacteristic misplaced modesty. Under Judge Posner's analysis, the only professionals for whom courts would develop malpractice standards would be lawyers.

although not legally trained, have an expertise that comes from devoting themselves full-time to labor relations. Holding these individuals to a standard of care of a reasonable non-lawyer labor relations professional effectuates the union's resource allocation decision.

Moreover, when a union decides to assign grievance handling or arbitration presentation to a lawyer, it has made the decision to allocate resources in that way. Holding the union liable under its DFR for its lawyer's malpractice does not impose a resource allocation decision on the union. It effectuates the decision that the union already has made. Employees who pay the dues or fees that support the union's use of lawyers in the grievance process are entitled to the level of professional competence that the union has led them to believe their money is buying.

Consequently, when a grievance predominantly involves the adjudication of an individual employee's claim, if a court finds that the union has not exercised reasonable care, it should hold the union liable for a DFR breach. As a remedy, it should remand the matter to the grievance procedure to enable the parties to proceed to arbitration. If the grievance already has been arbitrated, the court should vacate the award and remand for a new hearing before a different arbitrator. The court should retain jurisdiction while the matter proceeds to arbitration. If the arbitrator mitigates the employer's damages because of the union's DFR breach, the plaintiff may return to court to seek a compensatory award against the union.

Conclusion

The most common duty of fair representation claim, a claim attacking a union's competence in handling grievances, has received the least attention from the Supreme Court. The Court initially developed the duty of fair representation to afford a pre-Civil Rights Act remedy for racial discrimination. In its efforts to prohibit union-management discrimination, the Court excessively expanded the DFR in some instances and contracted it in others.

Enactment of the Civil Rights Act of 1964 freed the Court from the need to disguise an equal employment remedy as a labor law doctrine. This provided an opportunity for the Court to focus its attention on the labor law purposes of the DFR and on the most common DFR claim: grievance handling. Unfortunately, its efforts

to address the DFR in grievance handling have been limited to two holdings rejecting strict liability standards.

The Court, however, has embarked upon a new DFR jurisprudence which, like its prior race-discrimination driven cases, is result-oriented. In *Communication Workers of America v. Beck* and *Breininger v. Sheet Metal Workers International Association Local 6*, the Court has used the DFR to afford individual employees private causes of action for union violations of sections 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, thereby by-passing the exclusive jurisdiction of the National Labor Relations Board.

Meanwhile, the Court's refusal to address the DFR standard of care in grievance handling has led to a split among the lower courts. The division of authority stems from two different views of the grievance process and the union's role in it. In one view, the grievance procedure is an efficient substitute for litigation and the union serves as advocate for the individual grievant's contract rights. Under the other view, the grievance procedure is a continuation of the collective bargaining process and the union's role is to represent the bargaining unit as a whole.

Both views are accurate depending on the nature of the particular grievance. Consequently, the union's standard of care should depend on which function predominates in any particular grievance. Where the union is representing the unit as a whole in a continuation of the bargaining process, it should be liable for a DFR breach only when its conduct is so far outside a wide range of reasonableness as to be irrational. Where, however, the union is advocating an individual grievant's contract rights, it should be held to a standard of reasonable care in light of the circumstances and the identity and training of the union official processing the grievance. Where the union has breached its DFR, the remedy should be to remand the grievance to the grievance procedure.